No. 14-144

Title:	John Walker, III, Chairman, Texas Department of Motor Vehicles Board, et al., Petitioners v. Texas Division, Sons of Confederate Veterans, Inc., et al.
Docketed:	August 8, 2014
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Nos.:	(13-50411)
Decision Date:	July 14, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Aug 7 2014	Petition for a writ of certiorari filed. (Response due September 8, 2014)
Aug 26 2014	Order extending time to file response to petition to and including October 8, 2014.
Oct 8 2014	Brief of respondents Texas Division, Sons of Confederate Veterans, Inc., et al. in opposition filed.
Oct 21 2014	Reply of petitioners John Walker, III, in His Official Capacity as Chairman of the Board, et al. filed. (Distributed)
Oct 22 2014	DISTRIBUTED for Conference of November 7, 2014.
Nov 10 2014	DISTRIBUTED for Conference of November 14, 2014.
Nov 17 2014	DISTRIBUTED for Conference of November 25, 2014.
Dec 1 2014	DISTRIBUTED for Conference of December 5, 2014.
Dec 5 2014	Petition GRANTED.
Dec 12 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Dec 31 2014	Brief of petitioners John Walker, III, in His Official Capacity as Chairman of the Board, et al. filed.
Dec 31 2014	Joint appendix filed. (Statement of costs filed.)
Jan 7 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Jan 7 2015	Brief amicus curiae of Justice and Freedom Fund filed.
Jan 7 2015	Brief amici curiae of Ohio, et al. filed.
Jan 9 2015	The time to file respondents' brief on the merits is extended to and including February 9, 2015.
Jan 26 2015	Brief amici curiae of American Center for Law and Justice, et al. in support of neither party filed.
Jan 26 2015	Brief amici curiae of Phil Berger, President Pro Tempore of the North Carolina Senate, et al. in support of neither party filed.
Feb 2 2015	SET FOR ARGUMENT ON Monday, March 23, 2015
Feb 3 2015	Record requested from U.S.C.A. 5th Circuit.

Feb 3 2015	Record from U.S.C.A. is electronic and located on PACER.
Feb 9 2015	Brief of respondents Texas Division, Sons of Confederate Veterans, Inc., et al. filed.
Feb 9 2015	Record received from U.S.D.C. Western District of Texas (Austin) is electronic.
Feb 12 2015	CIRCULATED
Feb 13 2015	Brief amicus curiae of Children First Foundation, Inc. filed. (Distributed)
Feb 17 2015	Brief amicus curiae of The Rutherford Institute filed. (Distributed)
Feb 17 2015	Brief amici curiae of Cato Institute, et al. filed. (Distributed)
Feb 17 2015	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 17 2015	Brief amicus curiae of Americans United for Separation of Church and State filed. (Distributed)
Feb 17 2015	Brief amicus curiae of Foundation for Individual Rights in Education (FIRE) filed. (Distributed)
Feb 17 2015	Brief amici curiae of Choose Life Wisconsin, Inc., et al. filed. (Distributed)
Feb 18 2015	Brief amicus curiae of The Becket Fund for Religious Liberty filed. (Distributed)
Mar 11 2015	Reply of petitioners John Walker, III, in His Official Capacity as Chairman of the Board, et al. filed. (Distributed)
Mar 23 2015	Argued. For petitioners: Scott A. Keller, Solicitor General, Austin, Tex. For respondents: R. James George, Jr., Austin, Tex.
Jun 18 2015	Judgment REVERSED. Breyer, J., delivered the opinion of the Court, in which Thomas, Ginsburg, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Kennedy, JJ., joined.

Supreme Court, U.S.
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No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

PARTIES TO THE PROCEEDING

Petitioners John Walker III, Victor Vandergriff, Clifford Butler, Raymond Palacios, Jr., Laura Ryan, Victor Rodriguez, Marvin Rush, and Blake Ingram were Defendants-Appellees in the court of appeals.[1]

Respondents Texas Division, Sons of Confederate Veterans, Inc., Granvel J. Block, and Ray W. James were Plaintiffs-Appellants in the court of appeals.

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[1] Pursuant to Supreme Court Rule 35, the petitioners note that John Walker III, Victor Vandergriff, Clifford Butler, Raymond Palacios, Jr., Laura Ryan, Victor Rodriguez, Marvin Rush, and Blake Ingram were sued in their capacities as public officials. Victor Vandergriff and Clifford Butler no longer hold office. They have been replaced by Robert Barnwell III and Cheryl Johnson. John Walker III replaced Victor Vandergriff as Chairman of the Board.

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In the Supreme Court of the United States

No.

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

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PETITION FOR A WRIT OF CERTIORARI

This petition presents two circuit splits for the Court's consideration. The first circuit split involves whether the messages and images that appear on state-issued specialty license plates qualify as government speech. The Sixth Circuit answered "yes." *See ACLU v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006). Five other courts—including the court of appeals in this case—have answered "no." App. 16a; *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002); *Choose Life of Ill., Inc., v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Arizona Life Coalition v.*

Stanton, 515 F.3d 956, 965 (9th Cir. 2008). In the five circuits that have rejected the government-speech argument, a State cannot issue specialty license plates unless it maintains viewpoint neutrality among proposed license-plate designs. In the Sixth Circuit, by contrast, a State may issue specialty license plates that espouse a particular viewpoint without undertaking a constitutional obligation to offer specialty plates that display the opposite viewpoint.

There is also a circuit split over whether a State that rejects a specialty license plate can defend itself against a charge of "viewpoint discrimination" if the State has never issued or approved a license plate bearing a different viewpoint on the subject matter of the rejected license plate. The Seventh Circuit answered "yes" in *Choose Life of Illinois*. *See* 547 F.3d 853 at 865. The court of appeals (along with three other circuits) answered "no." App. 22a; *Sons of Confederate Veterans*, 288 F.3d at 625–26; *Roach*, 560 F.3d at 870; *Arizona Life Coalition*, 515 F.3d at 971–72.

The State respectfully asks this Court to grant certiorari on each of these questions.

OPINIONS BELOW

The opinion of the court of appeals is available at 2014 WL 3558001. App. 1a–50a. The district court's opinion, which upheld the State's decision to exclude the confederate battle flag from its license plates, is available at 2013 WL 1562758. App. 53a–112a.

JURISDICTION

The court of appeals entered its judgment on July 14, 2014. App. 51a–52a. The petitioners timely filed this petition for a writ of certiorari on August 7, 2014. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 115a–90a.

STATEMENT

The State of Texas requires state-issued license plates to be displayed on all registered motor vehicles. *See* Tex. Transp. Code § 504; 43 Tex. Admin. Code § 217.22. For many years the State offered only a single style of license plate. But Texas now manufactures a variety of license-plate designs and offers choices to the drivers who must display a state-issued license plate on their motor vehicles.

Drivers who choose to pay the normal vehicle-registration fee receive a plain-vanilla license plate with the State's name and nickname ("The Lone Star State"), along with a randomly generated sequence of numbers and letters. But drivers willing to pay an extra fee can receive a "specialty" plate containing a unique design or message. Sales of these specialty plates generate revenue for state agencies as well as charitable and non-profit organizations that the State deems worthy of support.

There are different ways by which a specialty-plate design can become part of the State's license-plate rep-

ertoire. Some plates are specifically authorized by the legislature. *See* Tex. Transp. Code §§ 504.601, 504.602–662. Texas also permits the Department of Motor Vehicles Board to design new specialty plates, either on its own initiative or in response to an application from a non-profit. *See* Tex. Transp. Code § 504.801. Finally, Texas sells plates though a private vendor, License Plates of Texas, LLC, dba MyPlates, which designs specialty plates and offers them to the public. *See* Tex. Transp. Code § 504.6011(a). Regardless of who designs or proposes a specialty plate, the Board must approve every license-plate design before it can be offered to the public. *See* 43 Tex. Admin. Code §§ 217.28(i)(7); 217.40.

In 2009, the Sons of Confederate Veterans proposed a specialty-plate design featuring the Sons of Confederate Veterans' logo. The logo consists of a square confederate battle flag surrounded on its four sides by the words "Sons of Confederate Veterans 1896"; the flag and its surrounding words are encapsulated together in an octagon. App. 191a (image of the proposed license-plate design). The Board received hundreds of public comments opposing the plate, and opponents of the plate appeared at the Board's meeting to voice their concerns. After hearing this testimony, the Board voted unanimously against issuing the plate, explaining that:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because

> such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

App. 69a.

The Sons of Confederate Veterans sued, accusing the Board of violating the Speech Clause by rejecting their proposed license-plate design. The State responded that the government-speech doctrine allows a State to choose the messages and symbols that will appear on its specialty license plates, and that in all events the Board's decision to reject the Sons of Confederate Veterans' license-plate proposal was not unconstitutional "viewpoint discrimination." The district court rejected the State's first argument, concluding that the State's specialty plates were a "nonpublic forum" in which the State must refrain from "viewpoint discrimination." App. 78a–92a. But the district court agreed with the State's second argument, and held that the Board did not engage in "viewpoint discrimination" by refusing to issue the plaintiffs' proposed license plate. App. 92a–103a. The district court therefore rejected the plaintiffs' constitutional claims and entered judgment for the State. App. 114a.

The court of appeals (over dissent) reversed the district court's ruling. The majority first held that the messages and symbols on state-issued specialty license plates are "private speech," not government speech. The State had argued that *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Johanns v. Livestock Marketing*

Ass'n, 544 U.S. 550 (2005), establish that a State's "final approval authority" and "effective control" over a proposed message makes the approved message government speech—even if it was designed or proposed by private entities. *Summum*, 555 U.S. at 472–73; *see also Johanns*, 544 U.S. at 561 ("The Secretary exercises final approval authority over every word used in every promotional campaign."). The majority, however, concluded that *Summum* "did not base its holding on [the] City's control over the permanent monuments," but rather "focused on the nature of both permanent monuments and public parks." App. 10a–11a. As for *Johanns*, the majority said only that "*Summum*, however, shows that 'the Supreme Court did not espouse a myopic "control test" in *Johanns*.'" App. 27a (quoting *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014)).

The majority then held that the appropriate "test" for government speech comes from Justice Souter's opinion concurring in the judgment in *Summum*: "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige." App. 11a (*quoting Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). The majority chose to apply Justice Souter's test for government speech even though it has never been endorsed by this Court, and despite language in *Johanns* that seems incompatible with Justice Souter's proposed approach. *See Johanns*, 544 U.S. at 564 n.7 ("[T]he correct focus is not on whether the ads' audience realizes the Government is speaking"); *id.* ("As we hold today, re-

spondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's*.") (emphasis added). The majority then declared that "the differences between permanent monuments in public parks and specialty license plates on the back of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech." App. 11a–12a.

The majority also declined to follow the Sixth Circuit's opinion in *ACLU v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), which held that specialty license plates are government speech immune from any requirement of viewpoint neutrality. The majority claimed that "the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*." App. 15a. The majority also tried to distinguish *Bredesen* by noting that Tennessee had "passed an act specifically authorizing, creating, and issuing a 'Choose Life' specialty license plate." App. 15a. But the majority did not deny that Texas's decision to reject the plaintiffs' license-plate proposal would have been upheld had the case been litigated in the Sixth Circuit. *See Bredesen*, 441 F.3d at 376 ("At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval.").

Finally, the court of appeals held that the State engaged in impermissible "viewpoint discrimination" by rejecting the plaintiffs' license-plate proposal. App. 24a.

The State had argued that its decision to keep the confederate battle flag off its license plates was viewpoint-neutral because the State has not issued any license plate disparaging the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. But the court of appeals rejected this argument. The court of appeals did not deny that the State has never approved a license plate that espouses any point of view on the confederacy or the confederate battle flag. But it said that "there is nothing in the Board's decision that suggests it *would* exclude all points of view on the Confederate flag." App. 22a (emphasis added). Then the court of appeals declared that "even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable." App. 22a. In the court of appeals's view, *any* decision to reject a specialty license plate "based on the speaker's message" constitutes viewpoint discrimination. App. 23a ("[T]he state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message."); App. 23a ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.").

Judge Smith dissented on the government-speech issue. App. 25a. Judge Smith first rejected the "reasonable observer test" that the majority used to distinguish government speech from private speech. In Judge Smith's view, "the 'reasonable observer' test demonstrably contradicts binding caselaw" from *Johanns* and *Summum*,

and he criticized the majority for "morph[ing] Justice Souter's lone concurrence [in *Summum*] (and his dissent from *Livestock Marketing*) into law." App. 27a; *see also* App. 29a ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). Judge Smith also argued that Texas's license plate program was analogous to the situation in *Summum* and rejected the majority's efforts to distinguish that case. App. 29a.

The majority opinion did not acknowledge or address several of the State's most important arguments. First, the State had argued that a "no viewpoint discrimination" rule would be untenable in the context of a specialty license plate program, because it would mean that States that issue "Fight Terrorism" specialty plates would become constitutionally compelled to offer license plates expressing support for terrorism or terrorist organizations. Many other specialty plates in Texas undeniably promote certain viewpoints at the expense of others, such as "Stop Child Abuse," "Mothers Against Drunk Driving," "Animal Friendly," and "Insure Texas Kids." The majority opinion did not explain how its "no viewpoint discrimination" rule could allow Texas to continue issuing these specialty plates without also offering plates that promote child abuse, drunk driving, animal cruelty, and messages opposing the State Children's Health Insurance Program.

Second, the State had argued that *Rust v. Sullivan*, 500 U.S. 173 (1991), allows States to control the messages and symbols that are used within the scope of a government program. *See id.* at 194; *see also Agency for Int'l Dev. v. Alliance for an Open Society Int'l, Inc.*, 133

S. Ct. 2321, 2329–30 (2013). The majority opinion did not cite *Rust* and did not address the State's claim that the text and logos on specialty license plates fall within the scope of a government program and therefore remain subject to the State's control under *Rust*. And the majority did not conduct any analysis of what the scope of the State's specialty license plate "program" might be.

Third, the State had argued that it should have the same freedom as private individuals to disassociate from messages or viewpoints that it does not wish to convey. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Wooley v. Maynard*, 430 U.S. 705 (1977). Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *see Wooley*, 430 U.S. at 715, neither should a State be forced to convey a license-plate holder's message by etching it onto a plate marked with the State's name. The majority opinion did not address whether (or to what extent) a State may disassociate from messages or symbols that it does not wish to propagate. *See generally Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding Texas's exclusion of the Ku Klux Klan from its Adopt-a-Highway program).

REASONS FOR GRANTING THE PETITION

I. THERE IS A DEEP, WELL-DEVELOPED CIRCUIT SPLIT ON WHETHER SPECIALTY LICENSE PLATES QUALIFY AS GOVERNMENT SPEECH

There is a 5-1 circuit split on whether a state-issued specialty license plate qualifies as "government speech."

The Sixth Circuit held in *Bredesen* that specialty license plates are government speech, and rejected the ACLU's argument that the State had created a "forum" for private speech that triggered a viewpoint-neutrality requirement. The Sixth Circuit also made clear that its government-speech holding extended beyond the "Choose Life" plates that the State's legislature had authorized, and applied to *all* specialty-plate designs over which the State held final approval authority:

> [T]here is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life. At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval. It is noteworthy that Tennessee has produced plates for respectable institutions such as Penn State University but has issued no plates for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party. Plaintiffs' position implies that Tennessee must provide specialty plates for these hate groups in order for it constitutionally to provide specialty plates supporting any institution. Such an argument falls of its own weight.

Bredesen, 441 F.3d at 376–77.

The court of appeals specifically rejected *Bredesen*, declaring that "[t]he Sixth Circuit's conclusion that specifically license plates are government speech makes it the sole outlier among our sister circuits" and that "the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*." App. 15a.

The court of appeals also observed that *Bredesen* involved "facts different from those in the instant case," as *Bredesen* involved a challenge to "Choose Life" specialty plates that the Tennessee legislature had specifically authorized. App. 15a. But the court of appeals never explained how this could distinguish *Bredesen*—and this is not a tenable basis on which to distinguish *Bredesen*. Suppose that the Texas legislature had specifically authorized a specialty license plate denouncing the confederacy or portraying the confederate battle flag in a negative light. There is nothing in the court of appeals's opinion to suggest that this would have caused it to change its decision and hold that the denial of the plaintiffs' proposed license-plate design was "government speech" immune from any requirement of viewpoint neutrality. And there is no basis for treating specialty plates authorized by a state legislature differently from specialty plates authorized by a state agency. No matter which entity of a state government authorizes or approves a specialty plate, the idea for the specialty plate is almost always proposed or suggested by a person or interest group from outside the government.

The Fifth Circuit is not alone in rejecting *Bredesen*'s government-speech holding. The Fourth, Seventh, Eighth, and Ninth Circuits have also issued rulings ex-

plicitly rejecting *Bredesen*. *See ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014) ("The Sixth Circuit ... held in *Bredesen* that Tennessee's 'Choose Life' specialty plate constituted pure government speech. . For the many reasons discussed above, we must agree with the Seventh Circuit that 'this conclusion is flawed ...'"); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("We think Judge Martin [who dissented in *Bredesen*] has it exactly right."); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) ("Notwithstanding the Sixth Circuit's conclusion to the contrary, we now join the Fourth, Seventh and Ninth Circuits in concluding that a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate."); *Arizona Life Coalition*, 515 F.3d at 963–68 (rejecting *Bredesen* and concluding that a "Choose Life" specialty plate represents "private speech," not government speech).

Six courts of appeals have now weighed in on this question, and they are divided 5-1 in favor of the view that messages and symbols on specialty license plates are private speech rather than government speech.[2]

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[2] The Eleventh Circuit has suggested in dictum that specialty license plates are not government speech. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003) ("We fail to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech."). But the Eleventh Circuit's opinion ultimately held that the plaintiffs lacked Article III standing to challenge Florida's "Choose Life" plates. *See id.* at 947 ("Appellants' (continued...)

There is little to be gained from awaiting further percolation. The opinion in *Bredesen* is thorough and scholarly, and five courts of appeals have issued opinions explaining why they reject that decision. The issue is ripe for this Court's resolution.

II. THE CIRCUITS ARE DIVIDED ON WHETHER A STATE ENGAGES IN "VIEWPOINT DISCRIMINATION" IF IT REJECTS A SPECIALTY PLATE WHEN IT HAS NOT APPROVED OR ISSUED A SPECIALTY PLATE ESPOUSING THE OPPOSITE VIEW

The Court should also grant certiorari to resolve whether Texas has engaged in "viewpoint discrimination" by rejecting the plaintiffs' license-plate proposal. The Fifth Circuit's analysis of viewpoint discrimination is untenable and irreconcilable with the Seventh Circuit's decision in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). The Court should grant certiorari to resolve this additional conflict among the circuits.

The State had argued that its refusal to issue a confederate license plate was viewpoint-neutral because it had not approved or issued a plate expressing *any* viewpoint on the confederacy, the confederate battle flag, or

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alleged injury therefore is not redressable by a decision of this court, and Appellants lack standing to bring their claims."). We do not include the Eleventh Circuit's statement in our circuit-split count, because federal courts cannot rule on the merits when they lack jurisdiction over a case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

the views espoused by the Sons of Confederate Veterans. But the court of appeals brushed aside that argument:

> [E]ven if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable. . . Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.

App. 22a–23a. This analysis obliterates any distinction between viewpoint discrimination and content discrimination, and renders a state guilty of "viewpoint discrimination" whenever it excludes any subject matter from its specialty license plate program. *See also* App. 23a ("[A] state engage[s] in viewpoint discrimination when it denie[s] a specialty license plate based on the speaker's message").

The Seventh Circuit's decision in *Choose Life Illinois* rejects this untenable understanding of "viewpoint discrimination." When Illinois refused to issue a "Choose Life" specialty plate, the Seventh Circuit held that this decision was viewpoint neutral because Illinois had not issued any specialty plate with abortion-related messages:

> Illinois has excluded the entire subject of abortion from its specialty-plate program. The Secretary argues this is a content-based but viewpoint-neutral restriction. We agree. . . . [T]he State has restricted access to the specialty-

> plate forum on the basis of the *content* of the proposed plate—saying, in effect, "no abortion-related specialty plates, period." This is a permissible content-based restriction on access to the specialty-plate forum, not an impermissible act of discrimination based on viewpoint.

Choose Life Ill., 547 F.3d at 865. True, the Seventh Circuit distinguished the Fourth Circuit's ruling in *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), and agreed with the Fourth Circuit that Virginia had engaged in "viewpoint discrimination" by rejecting the same specialty license plate that the plaintiffs have proposed in this case. *See* 547 F.3d at 865 ("Virginia was not imposing a 'no flags' rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint."). But there can be no doubt that under the Fifth Circuit's ruling in this case, a State will not be allowed to deny a request for a "Choose Life" specialty plate on the ground that the State has chosen to exclude the entire topic of abortion from its specialty license plate program. App. 22a. *Choose Life Illinois* would have come out differently had the case been litigated in the Fifth Circuit rather than the Seventh; that is enough to establish a circuit split on this question.

This circuit split is well-developed. The Fourth Circuit, like the Fifth Circuit in this case, held that Virginia engaged in "viewpoint discrimination" by excluding the confederate flag from its specialty license plate program, and specifically rejected the State's argument that its exclusion was "content-based, but viewpoint-neutral, be-

cause it bans all viewpoints about the Confederate flag." *Sons of Confederate Veterans*, 288 F.3d at 623. The Eighth and Ninth Circuits have deployed similar reasoning in the context of a State's refusal to issue "Choose Life" specialty plates, holding that the States engaged in "viewpoint discrimination" even though those States had never issued *any* specialty plate with abortion-related messages. *See Roach v. Stouffer*, 560 F.3d 860, 870 (8th Cir. 2009); *Arizona Life Coalition*, 515 F.3d at 971–72. Each of these four decisions is incompatible with the Seventh Circuit's holding in *Choose Life Illinois*.

III. THE FIFTH CIRCUIT'S RESOLUTION OF THESE ISSUES WILL HAVE UNTENABLE CONSEQUENCES

Certiorari is even more urgent because the court of appeals's ruling imposes an untenable legal standard on the State's specialty-license-plate program. The notion that the Constitution requires States to maintain viewpoint neutrality when deciding whether to issue specialty license plates is unworkable and leads to absurdities. Texas and other States issue "Fight Terrorism" license plates; a ban on viewpoint discrimination would require these States to offer specialty plates with pro-terrorism messages. Numerous other specialty plates will be on the chopping block unless the State offers an equal and opposite specialty plate. Texas issues specialty plates with messages such as "Stop Child Abuse," "Mothers Against Drunk Driving," and "Keep Texas Beautiful." The State of Texas has not approved (and will not approve) specialty plates that encourage child abuse, drunk driving, or littering. Under the court of appeals's "no viewpoint dis-

crimination" rule, it is not clear how any of these specialty plates can survive.

Worse, the court of appeals's ruling defines "viewpoint discrimination" to include *any* exclusion of a symbol or subject matter from a state-issued specialty license plate. App. 23a (defining "viewpoint discrimination" to include any "deni[al of] a specialty license plate based on the speaker's message."). After this ruling, it is not apparent how the State could exclude profanity, sacrilege, or overt racism from its specialty license plates. And the court of appeals made no effort to cabin the scope of its holding or define the extent of its reach.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING BOTH FIRST AMENDMENT QUESTIONS

This case presents a clean vehicle for the Court to resolve both the government-speech and the viewpoint-discrimination issues. The petition for certiorari in *Berger v. ACLU*, No. 14-35, also presents the question whether state-issued specialty license plates are government speech. But it is beclouded by two jurisdictional issues that have divided the courts of appeals.

The first is whether the ACLU's challenge to North Carolina's "Choose Life" specialty plate is barred by the Tax Injunction Act. Two courts of appeals have held that the Tax Injunction Act prohibits federal courts from entertaining lawsuits to enjoin the issuance of "Choose Life" plates—on the ground that the fees that the State collects in exchange for those plates is a "tax." *See Henderson v. Stadler*, 407 F.3d 351 (5th Cir. 2005); *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007); *but see Arizona*

Life Coalition, 515 F.3d at 962–63 (rejecting *Henderson*'s analysis of the Tax Injunction Act); *Bredesen*, 441 F.3d at 374–75 (same). The Fourth Circuit did not discuss the Tax Injunction Act in *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014), and the Attorney General of North Carolina did not raise the issue in his appellate briefing. But it does present a threshold jurisdictional issue for this Court to resolve, and the petitioners in *Berger* acknowledge that the Fourth Circuit's ruling is "at odds with" *Henderson*'s holding on the Tax Injunction Act. *See* Petition for a Writ of Certiorari at 14, *Berger v. ACLU of N.C.*, No. 14-35 (July 11, 2014).

The second jurisdictional issue in *Berger* is whether the plaintiffs have standing to seek a remedy that enjoins North Carolina officials from issuing "Choose Life" plates. The plaintiffs' alleged injury in *Berger* was their inability to obtain a specialty license plate with messages supporting abortion rights. *See* Complaint at 2, *ACLU of N.C. v. Conti*, 912 F. Supp. 2d 363 (E.D.N.C. 2012) (No. 5:11-cv-470-F). It is far from apparent how a judicial order shutting down the "Choose Life" specialty-plate program does anything to redress that alleged injury. As the Eleventh Circuit has explained:

> [T]he only cognizable injury Appellants could allege is that the State denied them an opportunity to assert their pro-choice point of view. The relief requested by Appellants, an injunction against the enforcement of [the statute authorizing "Choose Life" specialty plates], would not remedy this alleged injury. Removing pro-life speech from the forum does not in

> any way advance Appellants' opportunity to speak.

Women's Emergency Network v. Bush, 323 F.3d 937, 947 (11th Cir. 2003). Once again, the Fourth Circuit's opinion fails to discuss this jurisdictional problem. But this Court cannot ignore the threshold issue of standing, and the petitioners in *Berger* have already flagged it for this Court's attention. *See* Petition for a Writ of Certiorari at 18, *Berger*, No. 14-35.

The State respectfully submits that *Berger* would present an appropriate vehicle if this Court decides that it wants to resolve either or both of these threshold jurisdictional questions. We express no opinion on whether these jurisdictional issues are certworthy, as they are not presented in our case. But if the Court wants to resolve the merits of the First Amendment issues that have divided the courts of appeals, we respectfully urge the Court to grant certiorari in this case—regardless of whether the Court grants or denies the petition in *Berger*. Granting certiorari in *Berger* alone runs the risk that a majority of the Court will dispose of the case on jurisdictional grounds, preventing the Court from reaching the pressing First Amendment questions presented in these petitions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 2014

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit

FILED
July 14, 2014

Lyle W. Cayce Clerk

No. 13-50411

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually; RAY W. JAMES, Individually,

Plaintiffs-Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants-Appellees

Appeals from the United States District Court
for the Western District of Texas

Before SMITH, PRADO, and ELROD, Circuit Judges.
EDWARD C. PRADO, Circuit Judge:

The Texas Division of the Sons of Confederate Veterans and two of its officers (collectively "Texas SCV") appeal the district court's grant of summary judgment in favor of Victor T. Vandergriff, Chairman of the Texas Department of Motor Vehicles Board, and seven other board members (collectively "the Board"). Texas SCV argues that the Board violated its First Amendment right to free speech when the Board denied Texas SCV's application for a specialty license plate featuring the Confederate battle flag. The district court rejected Texas SCV's arguments and found that the Board had made a reasonable, content-based regulation of private speech. We disagree, and because the Board engaged in impermissible viewpoint discrimination, we reverse.

I. BACKGROUND

The State of Texas requires that all registered motor vehicles display a license plate. Tex. Transp. Code Ann. § 504.943; 43 Tex. Admin. Code § 217.22. Texas offers a standard-issue license plate, but, for an additional fee, drivers may display a specialty license plate on their vehicles. *See* Tex. Transp. Code Ann. § 504.008. Under Texas law, there are three different ways to create a specialty license plate. First, the legislature can create and specifically authorize a specialty license plate. *See id.* § 504.601–504.663. Second, any individual or organi-

zation can create a specialty plate through a third-party vendor. *Id.* § 504.6011(a). The Texas Department of Motor Vehicles Board must approve any plates created through the private vendor. 43 Tex. Admin. Code § 217.40.

The third and final means of creating a specialty license plate is at issue in this case. The Texas Department of Motor Vehicles Board can issue a new specialty plate, either on its own or in response to an application from a nonprofit organization. Tex. Transp. Code Ann. § 504.801(a). When a nonprofit organization proposes a plate, the Board must approve the plate's design and "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." *Id.* § 504.801(c). The proceeds from the sale of these specialty license plates go to either the Texas Department of Motor Vehicles or to a state agency of the nonprofit organization's choosing. *Id.* § 504.801(b), (e).

Texas SCV, a nonprofit organization that works to preserve the memory and reputation of soldiers who fought for the Confederacy during the Civil War, applied for a specialty license plate through this third process. Texas SCV's proposed plate features the SCV logo, which is a Confederate battle flag framed on all four sides by the words "Sons of Confederate Veterans 1896." A faint Confederate flag also appears in the background of the proposed plate. The word "Texas" is at the top of the plate in bold text, and "Sons of Confederate Veterans" runs in capitalized letters along the bottom of the plate. An outline of the state of Texas appears in the top, right corner of the proposed plate.

Texas SCV submitted its application in August 2009 to the Texas Department of Transportation, which was the agency responsible for administering the specialty license plate program at the time. The Department of Transportation put Texas SCV's proposed plate to a vote of its seven-member panel. During the first vote, three members voted to approve the plate, and two members voted against; two members failed to vote despite repeated efforts to encourage them to cast their vote. Instead of moving the plate to the public comment period, the Department of Transportation chose to hold another vote. During this second vote, one member voted to approve the plate, four voted against, and two members again failed to vote. The Department of Transportation then denied Texas SCV's application.

The Texas Department of Motor Vehicles subsequently assumed responsibility for administering the specialty license plate program, and Texas SCV renewed its application for a specialty license plate with the Board. The Board invited public comment on Texas SCV's proposed plate on its website and set a date for final review of the plate. Eight of the nine members of the Board were present for the final review meeting, and their vote was deadlocked, four in favor and four against the plate. The Board rescheduled the vote, in the hope that all Board members would be able to be present for the vote. Many members of the public attended the Board meeting where the second vote was scheduled to occur. Texas SCV's proposed plate elicited numerous public comments; while some were in favor, the majority were against approving the plate. At its second vote, the Board unanimously voted against

issuing Texas SCV's specialty plate. The Board's resolution explaining its decision stated:

> The Board finds it necessary to deny [Texas SCV's] plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Texas SCV sued in federal district court under 42 U.S.C. § 1983, asserting violations of its rights under the First and Fourteenth Amendments. Both parties moved for summary judgment, and the district court granted the Board's motion. First, the district court found that the specialty license plates were private, not government, speech. The court then analyzed Texas SCV's claims under the First Amendment and found that (1) the specialty license plate program was a nonpublic forum; (2) the Board's rejection of Texas SCV's plate "was a content-based restriction on speech, rather than a viewpoint-based limitation"; and (3) the content-based regulation was reasonable. Thus, the district court concluded that the Board had not violated Texas SCV's rights under the First Amendment and entered judgment for the Board.[1] Texas SCV timely appealed.

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[1] The district court did not reach Texas SCV's claim that the Board had violated its rights under the Fourteenth Amendment, and Texas SCV does not raise its Fourteenth Amendment argument on ap-

Continued ...

II. JURISDICTION

Neither party has argued that this Court lacks jurisdiction, but federal courts have a duty to consider their subject matter jurisdiction sua sponte. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). In *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), we were asked to decide whether Louisiana's specialty license plate program discriminated against pro-choice views in violation of the First Amendment. *Id.* at 352. Instead of reaching the merits, we held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, barred the suit, and we vacated and remanded with instructions for the district court to dismiss the case for lack of jurisdiction. *Id.* at 360. Because this case involves a seemingly similar fact pattern, we first consider whether the TIA bars the instant case.

Under the TIA, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. But, the TIA will not deprive federal courts of jurisdiction when "(a) the 'fees' charged by the state are not taxes for purposes of TIA, or if (b) *Hibbs v. Winn*, 542 U.S. 88 . (2004) can be read to encompass this suit." *Henderson*, 407 F.3d at 354. *Hibbs* opens the doors to federal court where the TIA might otherwise bar the suit if "(1) a third party (not the taxpayer) files suit, and (2) the suit's success will enrich, not deplete, the government entity's coffers." *Id.* at 359 (citing *Hibbs*, 542 U.S. at 105–09).

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peal.

We hold that the TIA does not bar this suit because this case falls under the *Hibbs* exception.[2] The first part of *Hibbs* is met because Texas SCV is a third party. *See Hibbs*, 542 U.S. at 108 ("[The TIA] has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum."). The second part of *Hibbs* is also met because, if Texas SCV succeeds in having its specialty license plate issued, it will actually enrich the state. *See* Tex. Transp. Code § 504.801(e) (explaining that the fees collected for specialty license plates reimburse the Board for administrative costs and also go to the credit of the state's specialty license plate fund or the Texas Department of Motor Vehicles fund).

Because the TIA does not bar this suit, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over this appeal of a final decision of a district court under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Elizondo v. Green*, 671 F.3d 506, 509 (5th Cir. 2012). We apply the same standard as

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[2] In *Henderson*, this Court concluded that the charges Louisiana citizens paid for the state's "Choose Life" specialty license plate were taxes, not fees. 405 F.3d at 356–59. Although there are differences between how the specialty license plate in *Henderson* and the specialty license plate here were created, we do not decide whether the charges for the specialty license plate here are taxes or fees. Because we hold that the *Hibbs* exception to the TIA applies, we have no reason to consider whether the first exception to the TIA applies.

the district court, and summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Elizondo*, 671 F.3d at 509.

IV. DISCUSSION

This case presents two primary issues on appeal. First, we must determine whether the speech on specialty license plates is government speech or private speech. If we conclude that the speech is private speech, we must then ask whether the Board's decision to reject Texas SCV's specialty license plate was a permissible content-based regulation or impermissible viewpoint discrimination. We address each issue in turn.

A. Government Speech or Private Speech

As a threshold matter, we must decide if the speech at issue is government speech. "A government entity has the right to speak for itself. [I]t is entitled to say what it wishes, and to select the views that it wants to express." *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 467–68 (2009) (alteration in original) (citations and internal quotation marks omitted). "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467. Thus, if we conclude that the speech in this case is government speech, the analysis ends because there has been no First Amendment violation—in fact, the First Amendment would not even apply. *See id.* ("If [Pleasant Grove City and its local officials] were engaging in their own expressive conduct, then the Free Speech Clause has no application."). If, however, we determine that the speech in question is private speech, we must

then apply traditional First Amendment principles and analyze whether the Board violated Texas SCV's right to free speech.

The parties disagree over the standard we should apply to determine whether Texas SCV's proposed plate is government speech. Texas SCV maintains that Justice Souter's concurrence in *Summum* sets out the best test for determining government speech: whether a reasonable and fully informed observer would understand the expression to be government speech. *See id.* at 487 (Souter, J., concurring). Texas SCV argues that any reasonable observer would view a specialty license plate as the speech of the individual driving the car. The Board also relies on the Supreme Court's opinion in *Summum*, but argues that speech is government speech when it is under the government's "effective control." Because the specialty license plates are state-approved and the state owns the design, the Board urges this is government, not private, speech.

The government speech doctrine is "recently minted," *see id.* at 481 (Stevens, J., concurring), and neither the Supreme Court nor this Court has articulated a test to identify government speech. To determine whether the specialty license plates are government or private speech, we look to the two opinions where the Supreme Court has most clearly formulated the government speech doctrine, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), and *Summum*. As we explain, when we compare this case to *Johanns* and *Summum* and consider the Supreme Court's method of deciding those two cases, we conclude that the speech here is private speech.

In *Johanns*, the Supreme Court held that a promotional campaign to encourage beef consumption that the government "effectively controlled" was government speech. *Id.* at 560. The government did not pay for the campaign itself; instead, it funded the campaign by charging an assessment on all sales and importation of cattle and on imported beef products. *Id.* at 554. The government, though, had "set out the overarching message and some of its elements" and had "final approval authority over every word used in every promotional campaign." *Id.* at 561. Thus, because the message in the promotional campaign was "from beginning to end the message established by the Federal Government," the campaign was government speech. *Id.* at 560.

Summum, however, shows that "the Supreme Court did not espouse a myopic 'control test' in *Johanns*." *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014). In *Summum*, the Supreme Court held that Pleasant Grove City, Utah ("the City") had not violated the First Amendment free speech rights of Summum, a religious organization, when the City refused to erect a permanent monument that Summum had tried to donate and place in a public park. The Court held there was no First Amendment violation because "the City's decision to accept certain privately donated monuments while rejecting [Summum's] is best viewed as a form of government speech." *Summum*, 555 U.S. at 481. The Supreme Court noted that the City "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *See Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61)). But, the Court did not base its holding on City's control over the permanent monuments. Instead,

its conclusion focused on the nature of both permanent monuments and public parks. The Court explained that governments have historically used monuments, such as statues, triumphal arches, and columns, "to speak to the public." *Id.* at 470. These "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* The Court also recognized that public parks are a traditional public forum. *See, e.g.*, *id.* at 469 ("With the concept of the traditional public forum as a starting point . . "). "Public parks are often closely identified in the public mind with the government unit that owns the land." *Id.* at 472. Thus, given the context, there was "little chance that observers [would] fail to appreciate" that the government was the speaker. *Id.* at 471.

Considering the emphasis on context and the public's perception of the speaker's identity in *Summum*, we think the proper inquiry here is "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige." *Id.* at 487 (Souter, J., concurring); *see also Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) ("Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (identifying government speech by asking "[u]nder all the circumstances, would a reasonable person consider the speaker to be the government or a private party").

Here, the differences between permanent monuments in public parks and specialty license plates on the

back of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech. Unlike their treatment of permanent monuments, states have not traditionally used license plates to convey a particular message to the public. Rather, license plates have primarily been a means of identifying vehicles. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (explaining that one of the reasons the state had asserted an interest in including its motto on state license plates was to "facilitate[] the identification of passenger vehicles"); Tex. Transp. Code Ann. §§ 504.001–504.948 (effecting a vehicle registration scheme); *see also id.* § 504.005 (mandating that each license plate have a "unique identifier"). License plates also do not have the permanent character of monuments in public parks. *See Summum*, 555 U.S. at 464, 480 (contrasting permanent monuments with "temporary displays" and "transitory expressive acts"). An individual may choose a new specialty license plate every year simply by paying a fee, *see* Tex. Transp. Code Ann. § 504.008, and an individual registers for a new license plate any time he or she moves to a new state.

Further, while public parks have traditionally been "closely identified in the public mind with the government" and have "play[ed] an important role in defining the identity [of] a city," the same cannot be said for license plates and the backs of cars. *See Summum*, 555 U.S. at 472. In *Wooley*, the Supreme Court held that New Hampshire could not force its citizens (the plaintiffs were Jehovah's Witnesses) to bear the "Live Free or Die" motto on standard issue license plates because it would be a violation of their First Amendment rights. 430 U.S. at 717. The Court never discussed whether the

plates were government or private speech. Instead, it presumed that the license plates were private speech, engaged in a First Amendment analysis, and explicitly stated that because a car was "private property," the government could not force individuals to bear a license plate with New Hampshire's motto. *Id.* at 713. Thus, the "Supreme Court has indicated that license plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle." *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) (citing *Wooley*, 430 U.S. at 717). And while the plates at issue in *Wooley* were standard-issue plates, here a third party designed and submitted the specialty license plate, making the connection between the plate and the driver or owner of the car even closer. *See Matwyuk v. Johnson*, No. 2:13–CV–284, 2014 WL 2160448, *13 (W.D. Mich. May 23, 2014) (discussing *Summum* and concluding that "vanity plates are viewed as defining the identity of the driver of the vehicle bearing them . . . and that [t]herefore, no reasonable government official would have believed that [the vanity plate] constituted government speech").

Moreover, this case does not present the unworkable system that the Supreme Court feared would be created "[i]f government entities must maintain viewpoint neutrality in their selection of donated monuments." *See Summum*, 555 U.S. at 479. The *Summum* Court noted the "well founded" concerns that requiring viewpoint neutrality would force the City to "either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cher-

ished monuments." *Id.* at 479. By contrast, here there is no danger of having too many specialty license plates because they do not take up physical space, nor is there a finite amount of space available for specialty plates. Indeed, whereas the park in *Summum* contained fifteen monuments, there are currently over 350 specialty plates in Texas. The Board has given no indication that there is any limit to the number of designs it will accept. Thus, given the differences between permanent monuments in public parks and specialty license plates on the back of cars, *Summum* does not dictate that specialty license plates are government speech.

Our conclusion that specialty license plates are private speech is consistent with the majority of other circuits that have considered the issue. *See Roach*, 560 F.3d at 867 (specialty plates are private speech); *Arizona Life Coal. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("Choose Life" plate with logo depicting the faces of two young children was private speech); *White*, 547 F.3d at 863 ("Messages on specialty license plates cannot be characterized as the government's speech"); *Sons of Confederate Veterans*, 288 F.3d at 621 ("SCV's special plates constitute private speech.").[3] Although only *Roach*

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[3] In *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010), the Second Circuit treated Vermont vanity plates as private speech. 623 F.3d at 53–54. The state did not argue that the vanity license plates were government speech before the district court, and though the state raised that argument on appeal, the Second Circuit declined to consider the issue. *Byrne*, 623 F.3d at 53 n.7 (explaining that it is "a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal"). Because *Byrne* did not analyze whether the vanity license plates were government or private speech, we do not include it here.

was decided after *Summum*, the Eighth Circuit did not think that *Summum* mandated that the specialty license plates were government speech. 650 F.3d at 868 n.3. And for the reasons we explained above, we agree.

The Board, though, urges us to follow the Sixth Circuit's decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), where the Sixth Circuit held that a specialty license plate was government speech. The Board claims *Bredesen*'s "holding extends to *all* specialty plates approved by state officials" and can serve as a model for this Court. We disagree. The Sixth Circuit's conclusion that specialty license plates are government speech makes it the sole outlier among our sister circuits. And the Sixth Circuit reached that holding based on facts different from those in the instant case: the Tennessee legislature itself had passed an act specifically authorizing, creating, and issuing a "Choose Life" specialty license plate. *Bredesen*, 441 F.3d at 372, 376. We think this distinction alone is sufficient to warrant a different outcome here. But even if it were not, we would decline to follow *Bredesen* because the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent, specifically *Wooley*. *See id.* at 386 (Martin, J., dissenting) (explaining that *Wooley* found the message on the license plate was private, even though the government had "crafted" and "had ultimate control over" the message); *see also White*, 547 F.3d at 863 (characterizing the Sixth Circuit's conclusion in *Bredesen* as "flawed" in part because of the difficulty in squaring the decision with *Wooley*).

As the Supreme Court has acknowledged, "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is

providing a forum for private speech." *Summum*, 555 U.S. at 470. But considering the situation here, we are confident that a reasonable observer would know that a specialty license plate is the speech of the individual driving the car. Thus, we hold that specialty license plates are private speech.[4]

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[4] The dissent asserts that the majority's "analysis presents a false dichotomy" that the speech must be only government or only private speech. But this is not so. Here, the reasonable observer test implicitly recognizes that specialty plates may have elements of both government and private speech. Ultimately, if "a reasonable and fully informed observer would understand the expression to be government speech," then it is just that. As we explain in the opinion, however, a reasonable observer would understand specialty plates to be private speech. In any event, we need not discuss or adopt a hybrid speech doctrine. Neither party has briefed the concept of hybrid speech or asked for the court to adopt such a doctrine. Nor has the Supreme Court addressed a hybrid speech doctrine.

Moreover, only the Fourth Circuit has discussed hybrid speech in evaluating restrictions of specialty license plates. *See Tata*, 742 F.3d at 568–69 & n.4; *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794, 800, 801 (4th Cir. 2004). In both opinions, the Fourth Circuit considered specialty license plates that the state legislature had specifically authorized. *Tata*, 742 F.3d at 566; *Rose*, 361 F,3d at 788. The Fourth Circuit used a traditional First Amendment analysis to hold, as we do, that a specialty license plate restriction constituted viewpoint discrimination. *See Tata*, 742 F.3d at 575; *Rose*, 361 F.3d at 794 ("My conclusion that the speech is mixed (both government and private) does not end the discussion, however. I must go on to consider whether the State has engaged in viewpoint discrimination and whether it may engage in viewpoint discrimination . . . .").

B. Content-Based Regulation or Viewpoint Discrimination

Because the specialty plate program is private speech, we must next determine whether the Board's rejection of Texas SCV's proposed plate was a permissible content-based regulation or impermissible viewpoint discrimination. Making this determination can at times be difficult because the distinction between a content-based regulation and viewpoint discrimination "is not a precise one." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995).

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Id.* at 828. Thus, the government may not "favor one speaker over another," "discriminat[e] against speech because of its message," or target "particular views taken by speakers on a subject." *Id.* at 828–29 (citations omitted). Viewpoint discrimination is presumptively impermissible for private speech. *See id.* at 830 ("[V]iewpoint discrimination is presumed impermissible when directed against speech otherwise within the forum's limitations." (citation omitted)); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (explaining that, in a nonpublic forum, the state may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view" (citation omitted)). On the other hand, we are also aware that "content discrimination may be permissible if it preserves the purposes of [the] limited forum." *Rosenberger*, 515 U.S. at 830. In distinguishing between these two types of discrimination, the Supreme Court has explained viewpoint discrimination is "an egregious form of content discrimination" that is "a

subset or particular instance of the more general phenomenon of content discrimination." *Id.* at 829–31 (citation omitted).

Texas SCV argues that the Board's denial of Texas SCV's proposed plate was viewpoint discrimination, because the Board "endorsed the viewpoint of those offended by the Confederate battle flag and discriminated against the view [of Texas SCV] that the flag is a symbol honoring the Confederate soldier, history, and Southern heritage." The Board counters that its decision was not viewpoint discrimination because it did nothing to disparage Texas SCV's view of the Confederate flag, nor did it reject the proposed plate merely because the Board opposed Texas SCV's view. The Board argues it made its decision based solely on the "objective inquiry" of how members of the public would react to Texas SCV's license plate.

We agree with Texas SCV and hold that the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment. In explaining its denial of Texas SCV's application, the Board stated it denied the plate, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive." By rejecting the plate because it was offensive, the Board discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage. The Board's decision implicitly dismissed that perspective and instead credited the view that the Confederate flag is an inflammatory symbol of hate and oppression. Texas's specialty license plate program features a number of plates that honor veterans, including Ko-

rea Veterans, Vietnam Veterans, Woman Veterans, Buffalo Soldiers, Operation Iraqi Freedom, and World War II Veterans. Given Texas's history of approving veterans plates and the reasons the Board offered for rejecting Texas SCV's plate, it appears that the only reason the Board rejected the plate is the viewpoint it represents.

We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message . . . pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."). As the Supreme Court has already recognized, "any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *See United States v. Eichman*, 496 U.S. 310, 318 (1990). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991) (citations and internal quotation marks omitted).

Further, the Board's "might be offensive to any member of the public" standard lacks specific limiting standards, which gives the state "unbridled discretion"

that permits viewpoint discrimination. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 351 (6th Cir. 2007). Indeed, the most recent license plate case to be decided by a federal court, *Matwyuk v. Johnson*, held just this. *Matwyuk* involved Michigan's vanity plate program, which did not allow any license plate configurations "that might carry a connotation offensive to good taste and decency." *Matwyuk*, 2014 WL 2160448, at *1. The *Matwyuk* court held that this "offensive" standard "impermissibly permits the . . . State to deny a license plate application based on viewpoint because the statute lacks objective criteria, and thus confers unbounded discretion on the decisionmaker." *Id.* at *10 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (noting "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional")).

Matwyuk's conclusion is consistent with many other courts that have held that similar standards present a "very real and substantial" danger that the defendant would exclude speech solely because of its viewpoint. *See United Food & Commercial Workers Union, Local 1099* v. *Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361–62 (6th Cir. 1998) (holding that the defendant's advertising policy prohibiting "controversial" advertisements was unconstitutionally overbroad because its application presented a "very real and substantial" danger that the defendant would exclude a proposed advertisement solely because of its viewpoint); *see McCauley v. Univ. of the V.I.*, 618 F.3d 232, 248–49 (1st

Cir. 2010) ("Paragraph R's use of 'offensive' is, 'on its face, sufficiently broad and subjective that [it] could conceivably be applied to cover any speech . . . th[at] offends someone.'" (alterations in original) (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008))); *Aubrey v. City of Cincinnati*, 815 F Supp. 1100, 1104 (S.D. Ohio 1993) (concluding that the Cincinnati Reds' banner policy allowing banners only if they were in "good taste" left "too much discretion in the decision maker without any standards for that decision maker to base his or her determination"); *Montenegro v. N.H. Div. of Motor Vehicles*, No. 2012-624, 2014 WL 1813278, at *5 (N.H. May 7, 2014) ("Because the 'offensive to good taste' standard is not susceptible of objective definition, the restriction grants DMV officials the power to deny a proposed vanity registration plate because it offends particular officials' subjective idea of what is 'good taste.'").

Here, the tortured procedural history that eventually led to the denial of Texas SCV's plate demonstrates that the subjective standard of offensiveness led to viewpoint discrimination. During the Department of Transportation's initial vote, a majority of a quorum voted to *approve* Texas SCV's plate. Instead of moving the plate to the next step in the approval process, the Department of Transportation chose to hold another vote. The record offers no valid procedural basis for the Department of Transportation's decision to disregard the initial vote approving the plate. Instead, e-mails between committee members reveal that some members wanted a second vote solely because of the controversial nature of Texas SCV's proposed plate; they denied the plate during this second vote. Once the Board took

control of the specialty license plate program, Texas SCV reapplied. At the public hearing before the Board voted on the plate, many members of the public who opposed Texas SCV's plate expressed their concerns about the fact that the plate featured the Confederate flag. Following this public hearing, the Board denied the plate. This sequence of events lends support to our conclusion that SCV's proposed plate was rejected because of its "controversial" and "offensive" viewpoint, which is impermissible viewpoint discrimination.

Further, we reject the Board's argument that the denial of Texas SCV's plate is a content-based regulation because it bans all viewpoints of the Confederate flag. First, there is nothing in the Board's decision that suggests it would exclude all points of view on the Confederate flag. The Board rejected Texas SCV's plate because members of the public found the proposed plate offensive without issuing any overarching ban on the use of the Confederate flag on Texas specialty license plates. But even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable. As the Supreme Court explained in *Rosenberger*,

> The assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas.

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The [idea] that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

515 U.S. at 831–32. Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.

We are not the only circuit to reach this conclusion. In fact, the majority of the other circuits to consider this question have held that the state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message. *See Byrne*, 623 F.3d at 59 (concluding that a Vermont statute barring vanity plate that referred to a religion or deity was viewpoint discrimination); *Roach*, 560 F.3d at 870 (concluding that Missouri's specialty plate program engaged in viewpoint discrimination when it denied a "Choose Life" plate); *Stanton*, 515 F.3d at 972 (holding that the denial of a specialty license plate application on the basis that the government chose not to enter the Choose Life/Pro-Choice debate was viewpoint discriminatory); *Sons of Confederate Veterans*, 288 F.3d at 626 (holding that a statute that prohibited display of the Confederate flag constituted viewpoint discrimination).

The Seventh Circuit's decision to the contrary does not persuade us to reach a different outcome. The Seventh Circuit is the only one of our sister circuits to consider this question and hold that excluding a specialty license plate because of its content did not violate the First Amendment. *White*, 547 F.3d at 867 (holding that excluding the entire subject of abortion from its specialty license plate program was content-based, but viewpoint-neutral, decision). But even the Seventh Circuit suggested it might have reached a different conclusion if faced with the denial of a specialty flag plate because it featured a Confederate flag. *See id.* at 865 ("The difference between content and viewpoint discrimination was more readily apparent in *Sons of Confederate Veterans* [*v. Virginia Department of Motor Vehicles*] . . . than it is here. Excluding the Confederate flag from a specialty-plate design . . [was a] fairly obvious instance[] of discrimination on account of viewpoint. Virginia was not imposing a 'no flags' rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint."). Thus, even considering the reasoning in *White*, we are not convinced to reach the same decision as the Seventh Circuit.

The government may not "selectively shield the public from some kinds of speech on the ground that they are more offensive than others." *See Erzonznik v. City of Jacksonville*, 422 U.S. 209, 209 (1975). That is precisely what the Board did, however, when it rejected Texas SCV's plate. Accordingly, we hold that the Board impermissibly discriminated against Texas SCV's viewpoint when it denied the specialty license plate.

V. CONCLUSION

For the foregoing reasons, we REVERSE and REMAND for further proceedings not inconsistent with this opinion.

JERRY E. SMITH, Circuit Judge, dissenting:

This is a jurisprudentially difficult case that can be conscientiously decided in a number of different ways. The majority has chosen a respectable approach: Applying a "reasonable observer test," it reverses a summary judgment for the state after holding that Texas's specialty license plates are not "government speech." Though I agree with much of the cogent and well-written majority opinion, I do not discern a "reasonable observer test" in the applicable caselaw and am also unable to distinguish *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). Because I would therefore affirm the summary judgment, I respectfully dissent.

I.

The majority correctly rules that we have jurisdiction to hear this matter, though I would not describe *Hibbs v. Winn*, 542 U.S. 88 (2004), as "open[ing] the doors to federal court[s] where the [Tax Injunction Act ("TIA")] might otherwise bar the suit" or as an "exception" to the TIA. *Winn* merely draws the contours of the TIA, holding that it does not apply where the plaintiff is *not* seeking to "enjoin, suspend or restrain" the collection of state taxes. That is the situation here, where plaintiff Texas Division, Sons of Confederate Veterans ("SCV") *wants* the state to collect taxes, and in *Winn*, in which the plaintiff *wanted* to compel Arizona to collect taxes, as contrasted with the situation in *Henderson v.*

Stalder, 407 F.3d 351 (5th Cir. 2005), in which the plaintiff wanted to *enjoin* Louisiana from collecting assessments on license plates. *Winn* does not provide an "exception" to the TIA's bar; if a plaintiff seeks to "enjoin, suspect or restrain" the collection of taxes, *Winn* would provide him no avenue for relief in federal court.

Moreover, I concur that the state has engaged in viewpoint discrimination: The reason it refused to allow SCV's license plate was that it objected to the pro-Confederate Flag design. I therefore agree that unless the government-speech doctrine protects the state's decision to refuse to produce the plate, SCV would be entitled to relief. I disagree with the majority, however, that the government-speech doctrine does not encompass Texas's decision as to what messages to accept on its license plates. The "reasonable observer" test is not an accurate reflection of discerned law but, instead, manifests an understandable desire to create a plain, quotable test.

II.

The "reasonable observer test" cannot be discerned from the law, though the majority is in good company, given that some of our sister courts have adopted it. The majority announces the "reasonable observer test" after analyzing *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), and *Summum*, but neither decision can be e1xplained by way of that test, and neither provides it. *Livestock Marketing*, as the majority acknowledges, was resolved by way of an "effective control" test. The Supreme Court was not opaque in its reasoning: The reason that government-speech doctrine encompassed ostensibly private ads for the beef industry was that the ads were "from beginning

to end the message established by the Federal Government," despite the major role played by private actors in crafting them. *Livestock Marketing*, 544 U.S. at 560.

Summum is of little more help to the majority, which logically must bypass large swaths of that opinion, inflate one portion of it, and ultimately morph Justice Souter's lone concurrence (and his dissent in *Livestock Marketing*) into law. Citing *ipse dixit* from the Fourth Circuit, the majority states that *Summum* "shows that 'the Supreme Court did not espouse a myopic 'control test' in [*Livestock Marketing*]." It is not obvious how the majority or the Fourth Circuit reaches that conclusion. According to the majority, *Summum* "did not base its holding on [the city's] control over the permanent monuments. Instead, its conclusion focused on the nature of both permanent monuments and public parks." From that characterization, the majority inaccurately reimagines *Summum* as a "reasonable observer" case.

Summum did discuss the association between public parks and governments, but that was only one portion of an opinion that emphasized "effective control" just as much, if not more:

> [T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection. [*Livestock Marketing*], 544 U.S., at 560–561. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Command-

> ments monument that is the focus of respondent's concern; and the City has now expressly set forth the criteria it will use in making future selections.

Summum, 555 U.S. at 472–78.

The fairest reading of *Summum* is that the Court emphasized a variety of aspects of the public park and saw all of them to weigh in favor of finding government speech. Depending how we count them, the Court gave about half a dozen reasons why the city was entitled to judgment but without attempting to mint any "test," and it is a demonstrable misreading of *Summum* to pigeonhole it as providing otherwise.

The only Justice who favored of a "reasonable observer" test was Justice Souter, and even he does not seem to believe that that test is the law in the wake of *Summum*. Sitting as a circuit judge after *Summum*, Justice Souter—rather than believing that *Summum* manifested a coalescence around his twice-proposed test (despite that no Justice joined his concurrence in *Summum*)—described the post-*Summum* government-speech doctrine as "at an *adolescent stage of imprecision*." *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J.) (emphasis added).

Perhaps more poignantly, the "reasonable observer" test demonstrably contradicts binding caselaw. In *Livestock Marketing*, the Court—again, applying an "effective control" test—held that television advertisements for the beef industry were government speech. What would a reasonable observer have seen when watching those ads? He would have seen the familiar trademark "Beef. It's What's for Dinner." And he would have seen the message "Funded by America's Beef Producers," the

logo for the "Beef Board," and a checkmark with the word "BEEF." *Livestock Marketing*, 544 U.S. at 554–55. Nowhere would the ad have given any indication that the federal government had anything to do with this industry advertisement.

If a "reasonable observer" test were the law, then Livestock *Marketing* was incorrectly decided. That is why Justice Souter, espousing the "reasonable observer" test for the first time, dissented in that case.

As for *Summum*, several, if not all, of the privately donated monuments bore some inscription indicating the donor. For example, the Ten Commandments monument (the monument that triggered the suit) bore the mark of the Fraternal Order of Eagles and a prominent statement authored by the order that the display was presented by it to the city; the order maintained the monument and took steps to ensure that its inscription remained visible. If the court were only asking whether a "reasonable observer" would see private speech when looking at the monuments, why would that reasonable observer not have concluded that the Ten Commandments monument was the speech of the Fraternal Order of the Eagles?[1]

The same goes for *Rust v. Sullivan*, 500 U.S. 173 (1991), which involved restrictions on federal funding for "family-planning services" and which prohibited physi-

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[1] The answer is that the reasonable observer may well have attributed the speech to *both* the Fraternal Order *and* the city. A fundamental error in the majority opinion is describing the government-speech doctrine as presenting a binary choice: government or private speech. As I explain, every government-speech case that resulted in a victory for the government—including *Summum*—involved private participation in the relevant speech.

cians from receiving grants under a federal program ("Title X") from counseling patients on abortion "as a method of family planning." Against a First Amendment challenge, the Court upheld Title X as a permissible exercise of the government's policy preferences in favor of life and against abortion, despite that the ostensible speaker is the physician, not the government.

Finally, in *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), a pre-*Summum* case, we held that the state's selection and use of textbooks in public schools was government speech, notwithstanding that a reasonable observer would *also* attribute the speech to several private actors: the authors, publishers, and editors of the textbooks. In short, it is not reasonably possible to reconcile the "reasonable observer" test with existing caselaw.

A final comment: The reasonable observer test would bless the government's behavior in any case involving viewpoint discrimination *so long as it made it clear enough that the government is endorsing the speech that remains in the forum*. How can it be that the law would provide a test that, by its terms, would allow the government an easy mechanism to shut down speech in any forum on any topic it wants? Undoubtedly, courts would still routinely condemn viewpoint discrimination, no matter how clearly the government indicates to third-party observers that it is engaging in the censorship. But what that should reveal is that the "reasonable observer test" is not the law.

III.

The majority properly notes that five courts of appeals have expounded on the applicability of the gov-

ernment-speech doctrine to license plates.[2] The majority understandably emphasizes that all but one have held government-speech doctrine inapplicable.[3] But the landscape is more complicated than that.

None of those circuits meaningfully negotiates *Summum*. That is unsurprising, given that only one of their decisions post-dates *Summum*. And even that opinion was issued less than a month after *Summum*, relegated *Summum* to a footnote, and rejected its relevance summarily.[4] Yet, *Summum* makes the instant question more difficult than such treatment would suggest.

SCV conceded at oral argument that, despite its repeated admonitions that the (near) harmony of our sister courts' judgments should weigh heavily on our own, we are the first court meaningfully to consider the ap-

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[2] In this court's only post-*Summum* case dealing (briefly) with government speech, we, in *dictum*, stated that a city's financial support of certain street processions was insufficient to render it "government speech." The key reason was that, though the city gave the parade organizers waivers from having to pay for cleanup, the city did not otherwise have any relationship with the procession's message. *See Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 360 (5th Cir. 2010) (*dictum*; judgment affirmed on other grounds).

[3] *Compare Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (coincidentally involving another division of the SCV); *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008); and *Rouch v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (all holding government speech doctrine inapplicable) *with ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (over a dissent, applying government speech doctrine to specialty plates).

[4] *See Rouch* 560 F.3d at 868 n.3.

plicability of *Summum* to these facts. I address that now.

A.

Pleasant Grove City, Utah, has a 2.5-acre public park in its historic district that contained fifteen displays, at least eleven of which were donated by private groups or individuals. The monuments included, among other things, a Nauvoo Temple Stone (an artifact from the Mormon Temple in Nauvoo, Illinois, donated by John Huntsman), a Pioneer Water Well donated by the Lions Club, a Pioneer Granary donated by "the Nelson family," a September 11 monument donated by the Eagle Scouts, and—most relevant to the dispute in *Summum*—a Ten Commandments monument donated by the Fraternal Order of the Eagles in 1971. Several, if not all, of the privately donated monuments bore some inscription indicating the donor. For example, the Ten Commandments monument (which was the monument that, according to the plaintiffs, manifested Pleasant Grove's viewpoint discrimination) bore the mark of the Fraternal Order and a prominent statement authored by the order that the display had been presented by it to the city. The order maintained the monument and took steps to ensure that its inscription remained visible.

Summum, a religious organization, twice wrote to the mayor requesting permission to erect a stone monument containing the "Seven Aphorisms of SUMMUM," similar in size and nature to the Ten Commandments monument; the city rejected the request. Summum sued under 42 U.S.C. § 1983, claiming that the city was engaged in viewpoint discrimination by accepting a Ten Commandments monument but not Summum's religious monument.

The Court held that when the city decided which private monuments it would accept and install in the park, the city was itself speaking, even if it was joining the company of private speakers. Because the city was speaking for itself, the First Amendment were irrelevant, and dissenters could not force the city to accept monuments that it did not wish to have in its park. What is striking about *Summum* is just how much one can analogize almost every salient fact there to the facts here.

B.

1.

First, the Court noted that all parties in *Summum* had agreed that if "a monument . is commissioned and financed by a government body for placement on public land," the monument would undoubtedly "constitute[] government speech." *Summum*, 555 U.S. at 470 (describing this statement as an "obvious proposition").[5] The Court then held that the result did not change just because the monuments were privately financed and donated in final form:

> Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of

[5] I take it that SCV would not dispute this proposition, *i.e.*, that this case exists only because Texas has decided not to force drivers to display plates that it designs on its own.

> permanent monuments that convey a message with which they do not wish to be associated.

Id. at 471. The same can be said of Texas's specialty license plates, which are made, owned, and sold by the state,[6] which also owns the intellectual property in those plates and does not permit owners to bear plates other than its own.

Just as Pleasant Grove invited or allowed private actors to submit possible monuments for placement in its parks, Texas invites private groups or persons to submit license-plate designs for consideration, but the state ultimately chooses what designs it wishes to adopt and which plates it wishes to manufacture for sale.[7] Also just as private monuments supplemented those placed by Pleasant Grove in its parks, the privately designed license plates supplement those designed by Texas itself.[8] The reasoning in *Summum* informs that if Texas license plates would constitute government speech if only Texas had designed the plates itself, they do not lose their governmental character just because Texas accepted a privately designed message, endorsed it, and then placed it on its plates.[9]

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[6] *See* TEX. TRANSP. CODE § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate.").

[7] *See* 43 TEX. ADMIN. CODE § 17.28(i)(8)(B) (providing the DMVB with "final approval authority of all specialty license plate designs"); 43 TEX. ADMIN. CODE § 217.40 (detailing elaborate approval process for private vendor plate designs).

[8] *See* TEX. TRANSP. CODE ANN. § 504.005.

[9] *See also Summum*, 555 U.S. at 471 ("[W]hile government entities regularly accept privately funded or donated monuments, they have exercised selectivity."); *id.* at 473 ("[T]he City has effectively controlled the messages sent by the monuments in the Park by exercising

Continued ...

2.

Second, the *Summum* Court noted, 555 U.S. at 472, that "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land," a phenomenon that will cause jurisdictions to be selective in which images they choose to represent them:

> [Parks] commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

Id.

Again, the same can be said of license plates: They are uniformly identified with the state governments that issue them. People see plates when driving on the highways and immediately will recognize and describe them as "Texas license plates." Even specialty plates cannot exist but for the state's cooperation and effort to manufacture and sell them.[10]

Unlike monuments, license plates broadcast an associational image of the state on Texas vehicles wherever

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'final approval authority' over their selection.") (quoting *Livestock Marketing*, 544 U.S. at 560–61).

[10] *See generally* TEX. TRANSP. CODE ANN. § 504.945(a).

they may travel. And unlike monuments, license plates play an integral role in the most usual and rote form of interaction between a citizen and a state's regulatory body: registering one's vehicle. And also unlike monuments, there are no license plates that do not bear the name of the state of registration, directly imputing the state's goodwill and reputation on whatever communication the plate bears.

License plates exist only because of state regulation. They are a method of effecting state vehicle registration regimes, at once *sui generis* and akin to drivers' licenses, passports, currency, green cards, public school or military IDs, or others documents produced by virtue of a state regulatory regime. The association between license plates and a particular government, for that reason alone, could hardly be stronger.[11] It follows that the law allows Texas to choose whether it wishes its name to be associated with any criticism associated with the Confederate flag—whether it wishes the state to be linked to that flag wherever Texas cars are driven.[12]

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[11] This analysis calls into question whether the majority is even applying its proffered test correctly. If a reasonable, *informed* observer knows all I have just described of Texas license plates, how could that observer not attribute the message to Texas?

[12] *Cf. Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 331–32 (1st Cir. 2009) (applying *Summum* where a town decided which hyperlinks it would post on its website). The majority's contrary conclusion is largely *ipse dixit*, and I invite the reader to compare the reasons I have given for what would be an obvious association between a state and its license plates with the explanation given by the majority. The majority relies, in part, on *Wooley v. Maynard*, 430 U.S. 705, 716 (1977), noting that "one of the reasons the state had asserted an interest in including [the challenged motto in that case]" was to "facilitate[] the identification of passenger vehicles." What the

Continued ...

3.

Third, the *Summum* Court, 555 U.S. at 474, distinguished between the kinds of free speech rights usually occurring on public lands—"the right to speak, distribute leaflets, etc."—and the monuments at issue. The "City ha[d] made no effort to abridge [Summum's] traditional free speech rights," so its followers could continue to go onto the park, speak, distribute literature, and presumably picket and hand out petitions. *Id.* Summum just could not erect fixtures on the park. What Summum really demanded, at bottom, was the city's "adopt[ion]" or "embrace" of its message. *Id.*

The same can be said here. Texas does not prevent SCV from engaging in speech on its or its members' vehicles in the same way that speech has traditionally been made: by license plate frames, bumper stickers, window stickers, window flags, or even painting cars with the Confederate flag. If SCV and its members can do all of those things, why is it seeking an order from a court compelling Texas to sell Confederate plates? The answer is the same answer in *Summum*: SCV seeks the kind of "adopt[ion]" and "embrace" that comes with being on Texas license plates, with appearing next to the state's flag, name, and likeness, and being given the kind of validation that follows from appearing on a

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majority does not mention is that the other interest asserted by New Hampshire was to "promote[] appreciation of history, individualism, and state pride." *Id.* So much for the putative novelty of Texas's speaking on its plates. In any event, as I will explain, neither this dissent nor *Summum* is in tension with *Maynard*, which involved a different First Amendment doctrine that addresses concerns different from those pressed by the plaintiffs here.

state-issued license plate. It is precisely the reason that SCV wants to force Texas to produce these plates that it should be denied a court order doing so. Texas, like Pleasant Grove, cannot be forced to associate with messages it does not prefer.

The analogy applies in another important respect. Unlike pamphleteering, speeches, marches, picketing, and bumper stickers—all of which unquestionably involve private speech, even if they occur on government-owned property—erecting monuments and manufacturing specialty license plates both *require* the government's assistance and complicity. That distinction, yet again, makes specialty plates more like park monuments and less like leafleting and bumper stickers.

C.

Although I have addressed the striking similarities between this case and *Summum*, there are differences: The relationship between the cases is that of an analogy, not an identity. Even in light of every distinction proffered by SCV, the district court, and the majority, there is no principled basis to deviate from *Summum*.

1.

The majority opinion presents government-speech doctrine as a binary choice, as deciding whether the plates are "government speech *or* private speech," and stating that "[i]f we conclude that the speech is private speech," we then ask whether the state engaged in viewpoint discrimination. According to the remainder of the majority's reasoning, if a reasonable observer would attribute the message on license plates to the driver, the analysis is over, and the speech is "private" as contradis-

tinguished from "government" speech. That analysis presents a false dichotomy not present in *Summum*.[13]

In *Summum*, the overwhelming majority of the monuments were designed, built, and donated by private actors; and at least some portion (if not all) of the privately donated monuments bore the inscription, name, and/or written message of the donors, including the particular monument that Summum challenged as manifesting viewpoint discrimination. Because of the city's selectivity in deciding which private messages to endorse, the Fraternal Order effectively had a venue that Summum did not. The Court did not hold, however, that such was enough to trigger the protections of the First Amendment.

Indeed, the Court did not seem to find particularly relevant that when the city spoke, it had the company of private speakers. To the contrary, the Court repeatedly disavowed the relevance of the private aspects of the speech that Pleasant Grove was adopting, emphasizing that a "government entity may exercise th[e] same freedom to express its views when it receives assistance from private sources for the purpose of a delivering a government-controlled message" as when it acts alone.[14]

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[13] *See* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 400–10 (2009) (canvassing the growing awareness of the limits of this binary conception); *see also* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (proposing to apply intermediate scrutiny to so-called "hybrid" speech cases).

[14] *See Summum*, 555 U.S. at 468 (citing *Livestock Marketing*, 544 U.S. at 562; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also id.* at 470–71 ("Just as government-commissioned and government-financed monuments speak for the

Continued ...

Because Texas cannot constitutionally force its citizens to carry its message on their cars,[15] there will always be an element of private expression in specialty license plates—no matter their method of distribution or the author of their design—because the driver must have voluntarily chosen to accept a Texas plate. If an affected element of private speech is enough to foreclose application of government-speech doctrine, then the majority's reasoning reduces to this: Texas may not speak on its license plates. It is a false dichotomy to suggest, then, that either Texas is speaking or private citizens are speaking.[16]

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government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."); *id.* at 472 ("Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park."); *Livestock Marketing*, 544 U.S. at 562 (stating that where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources); *Rosenberger*, 515 U.S. at 833 (opining that a government entity may "regulate the content of what is or is not expressed when it enlists private entities to convey its own message").

[15] *See Maynard*, 430 U.S. at 717 (ruling that New Hampshire could not force Quaker to bear license plate with the phrase "Live Free or Die," the state motto).

[16] *See* Joseph Blocher, *Government Property and Government Speech*, 52 WM. & MARY L. REV. 1413, 1479–80 (2011) ("The unavoidable implication is that the expression emanating from specialty license plates is both governmental and private. [A] reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message.").

The kind of association between Texas and its specialty license reflects the kind of association typical of advertisers and sponsors generally. When we attend a Houston Texans NFL game at its home stadium and see "Ford: the Best in Texas," both the Houston Texans and Ford are speaking. Ford is saying it is the best in Texas; the Texans team is indicating that it is comfortable having its name, reputation, and goodwill associated with Ford and its products. And that association matters; endorsers and sponsors will engage or disengage with one another based on their mutual willingness to be associated with the other.[17]

In the end, *Summum* already tells us how to deal with the mixed quality of affected speech. There, as noted, the private designers and donors of the monuments often kept their own marks and included their own written messages with the monuments accepted by Pleasant Grove. In fact, the very monument that Pleasant Grove challenged as manifesting viewpoint discrimination bore the trademark of a private organization with a plaque containing a message that group had authored. By its facts, then, *Summum* already teaches that government

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[17] *Cf. Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding exclusion of the KKK from Texas's Adopt-a-Highway program, though describing the prohibition as "viewpoint-neutral"). Justice Stevens, who, like Justice Souter and the panel majority, would prefer a "reasonable observer test," does not fail to appreciate this. *See Summum*, 555 U.S. at 481 (Stevens, J., concurring) ("While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, *instead of being characterized as 'government speech,' had merely been deemed an implicit endorsement of the donor's message.*") (emphasis added).

cannot be forced to associate with all viewpoints just because it chooses to associate with one.

The *dictum* in *Summum* describing other monuments suggests the same. The Court, apparently believing them to be obvious examples of government speech, discusses several monuments that have some elements of private speech, such as the Grego-Roman mosaic of the word "Imagine," donated to New York in memory of John Lennon. *See Summum*, 555 U.S. 474–78, for several similar examples. *Summum*, it should be noted, was not remarkable in this regard. Every government speech case in which the government won (few as they are) has involved private participation and sometimes even concerned, as here, private dissemination.[18]

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[18] *See Livestock Marketing*, 544 U.S. at 555 (finding government-speech doctrine applicable despite that a board of private beef growers managed and produced the relevant promotional campaigns and that the promotional materials were ostensibly associated with said private producers, where the Agriculture Secretary approved all messages before they were disseminated; the advertisement also ran on private newspapers and television stations); *Rust*, 500 U.S. at 192–95 (upholding use of private physicians and hospitals to disseminate government's policy encouraging live birth); *Sutliffe*, 584 F.3d at 329–35 (Town setting up and controlling a town website, choosing which third-party hyperlinks it would allow; describing *Summum* as "mak[ing] it clear that when the government uses its discretion to select between the speech of third parties for presentation through communication channels owned by the government and used for government speech, this in itself may constitute an expressive act by the government that is independent of the message of the third-party speech"); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1011 (9th Cir. 2000) ("While these faculty and staff members may have received materials from outside organizations, the faculty and staff members alone posted material on the bulletin boards, and at all times their postings were subject to

Continued ...

Finally, the state can engage in government speech despite the adoption and use of private speech in delivering its message, though no one would question the "mixed" association an observer would have on the message. In *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005), a pre-*Summum* case, we held that the state's selection and use of textbooks in public schools constituted government speech, notwithstanding that the textbooks were unquestionably also the speech of their private authors. These cases reveal that the fact that an observer might *also* associate a message with a driver (as well as a private sponsor, such as SCV, for that matter) in addition to the State of Texas does not render the government-speech doctrine inapplicable.

The foregoing analysis also meets SCV's argument that *Maynard*, which held, 430 U.S. at 717, that New Hampshire could not compel drivers to carry "Live Free or Die" license plates, forecloses applying the government-speech doctrine.[19] *Maynard* was decided before the Supreme Court announced the government-speech doctrine, so that was not at issue. Nevertheless, there is no tension between *Maynard* and the lessons to be drawn from *Summum*. Both compel us to conclude that speech on license plates is "mixed" insofar as it will be associated with both the state and the driver. *Maynard* informs us

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the oversight of the school principals."); *Newton v. LePage*, 789 F. Supp. 2d 172, 184 (D. Maine 2011) (private artist commissioned by state to paint a pro-labor mural); *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 282 (4th Cir. 2008) (school board circulating communications by private individuals in support of board's position that particular piece of legislation be voted down).

[19] The panel majority did not rely on *Maynard*, but I address it because it was urged by SCV.

that, under the compelled-speech doctrine, the government may not *force* private speakers to disseminate its message in such a circumstance.[20] *Summum* informs us that, under the government-speech doctrine, the government will not be forced to associate with all private messages just because it associates with some.

So, if Pleasant View were *ordering* Summum to erect its monument with an inscription indicating its endorsement of the city, *Maynard* would say the city's conduct is unconstitutional. But where SCV wants to force Texas to produce plates bearing messages with which it does not want to be associated, *Summum* tells us that Texas may permissibly refuse.

2.

The majority attempts to distinguish *Summum* on the ground that "this case does not present the unworkable system that the Supreme Court feared would be created '[i]f government entities must maintain viewpoint neutrality in their selection of donated monuments.'" For at least two reasons, that second proffered distinction is not a helpful basis for deciding this case.

First, the Court was well aware that content-neutral time, place, and manner restrictions could unquestionably handle every "practical" problem that would manifest itself if park fixtures were considered to create a forum. The Court explicitly rejected the invitation to decide the case accordingly. *See Summum*, 555 U.S. at 479. Second, no other government-speech case[21] in which the government prevailed presented the

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[20] *See also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

[21] The exception is *Newton v. LePage*, 789 F. Supp. 2d 172, 185 (D. Continued ...

kind of "practicality" problem that physical congestion presented in *Summum*. *See, e.g.*, *Livestock Marketing* 544 U.S. at 555 (involving television ads).

Physical congestion, then, is not and cannot be a talisman for finding government speech. Do we have any reason to think that *Summum* would have come out differently if instead of a 2.5-acre park, the city had a 25-acre park? I can think of none. Moreover, *dictum* from the Supreme Court explicitly *assumed* that monuments in NYC's Central Park (which is 778 acres) would qualify as government speech for the same reason as did the park in *Summum*.[22]

For basically the same reason, it is no material distinction that there are 300 types of specialty license plates instead of 15 monuments. Do we have any doubt that Central Park could accommodate 300 privately donated fixtures if the city were inclined to accept them? I presume the argument is not that it would be surprising that the government would ever take positions on 300 topics; that would surely be wrong. At any rate, it would be impossible for us to derive a principle that Texas can speak on its own license plates without opening up a forum, but only if it resolves to associate with no more than X number of positions on Y number of topics.

Perhaps the majority is alluding to a distinction offered by the district court that license plates do not take up "public space." I assume what the court meant here is

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Maine 2011), which involved a mural inside a state building's anteroom.

[22] *See Summum*, 555 U.S. at 474–75 (discussing the John Lennon memorial in Central Park).

public real estate.[23] But that could not be relevant. Government messages on currency—the paradigmatic[24] example of government speech—similarly do not take up public "space." Nor do other more obvious methods of speaking, such as press conferences at the Presidential podium, sense-of-Congress resolutions, or, to take a dramatic example of government speech, the Emancipation Proclamation.

Less dramatically but more relevant, neither *Rust* nor *Livestock Marketing* involved occupation of public real estate. *Livestock Marketing*, for its part, involved television and print ads, the former of which occupies "space" in no sense except the metaphorical. *See Livestock Marketing*, 544 U.S. at 555. And *Rust* involved spoken and written words from physicians and hospitals to patients. *See Rust*, 500 U.S. at 179–80. So, it cannot be the law that the government can speak without opening up a forum and can elicit private assistance in disseminating or even endorsing its message, but only where its actual speech is a fixture on real estate.

The caselaw makes the point well enough, and reason confirms its lesson. The irrelevance of an "occupied public real estate" distinction becomes apparent when we recall what aspect of the specialized license plates triggered the challenge here. No one disputes that if Texas designed its own license plates and compelled driv-

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[23] That is because license plates do take up physical, though noncontiguous, space, and it would presumably be financially impracticable to have an infinite number of license plates.

[24] *See* Carl G. DeNigris, *When Leviathan Speaks: Reining in the Government-Speech Doctrine Through a New and Restrictive Approach*, 60 AM. U. L. REV. 133, 135 (2010).

ers to carry only those plates,[25] the government-speech doctrine would apply as clearly as it does to currency or passports. The only reason this case exists is because Texas lets drivers choose plates that were sometimes designed by private actors. Yet, we cannot say that one type of plate takes up "public space" but the other does not.

3.

The majority, like the district court, also attempts to distinguish *Summum* on the ground that license plates are not "permanent" as are the monuments. At first, this might appear to be a potentially important distinction until one realizes what the Court was explaining in *Summum* with its emphasis on monuments' "permanence" and when one pursues the logical rigor of a rule based on something as relative a concept as "permanence."

Although the *Summum* Court did repeatedly emphasize the permanent nature of the monuments, it had an obvious rhetorical purpose in doing so. Summum was arguing on appeal, with the aid of broad language from Supreme Court precedent, that public parks had been held since "time immemorial" to be a quintessential public forum, where state regulation of speech would be subject to the most exacting scrutiny. Because of that tradition, Pleasant Grove should not have been allowed to engage in what our jurisprudence would consider,

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[25] Perhaps with a blank option to satisfy *Maynard*, 430 U.S. at 717 (stating that the state could not force Quaker to bear license plate with the phrase "Live Free or Die," the state motto).

along with prior restraints, to be the very worst form of speech restriction: viewpoint discrimination.

The Court responded that the kind of speech that courts had in mind when describing public parks in such lofty terms did not include the installation of fixtures. *See Summum*, 555 U.S. 478–79. Rather, courts were considering things such as pamphleteering, giving speeches, canvassing, leafleting, demonstrations, and the like. So, when the Court emphasized the "permanence" of monuments, it does not appear to have thought that permanence *qua* permanence was significant but instead that that characteristic distinguished the kinds of speech that had already been held to be protected in public parks from the kinds of speech Summum wanted to engage in, which had never been held to be protected in public parks.

That is the only understanding of *Summum*'s discussion of "permanence" that accords with reason. We know that permanence cannot be significant in *itself*, because it is a relative concept that does not supply its own meaning, much less its own significance. Monuments, like license plates, can be removed and added over time.[25] More illustratively, the ads in *Livestock Marketing* were no more "permanent" than was the government

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[25] *See, e.g.*, *Newton* (applying government-speech doctrine to a governor's removal of a large, wall-sized mural depicting Maine's labor history from lobby of government building; the mural had been in place for three years). Many of the statutory specialty plates in Texas have been around for over ten years. *See, e.g.*, Registration of Vehicles and the Issuance of License Plates by the Texas Department of Transportation; Providing Penalties, 2003 Tex. Sess. Law Serv. ch. 1320 § 6 (H.B. 2971) (Vernon's). Does that connote less "permanence" than does a removable fixture?

speech on Texas's license plates—perhaps less so, because television and radio ads are by their nature fleeting. *See Livestock Marketing*, 544 U.S. at 555. Yet, that did not give the Court any pause in concluding that the ads in *Livestock Marketing* constituted government speech. And again, the quintessential forms of government speech (on currency, passports, and other traditional methods of speaking) do not suggest a kind of "permanence" that reveal the significance of that characteristic.

I do not take SCV to be arguing—as the plaintiffs in *Summum* were—that the putative forum in question is a traditional public forum,[27] like parks, in which the freedom of speech is at its apex. So, unlike the Court in *Summum*, we are not confronted with the difficulty of distinguishing *kinds* of speech in a particular forum and deciding whether all of those kinds of speech are similarly protected by our tradition.

IV.

In sum (pun intended), none of the differences between this case and *Summum* are differences in principle, and none offers a defensible justification for why Pleasant Grove City was entitled to a judgment in its favor in *Summum* but Texas is not so entitled here. The

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[27] The majority curiously attempts to distinguish *Summum* on the ground that license plates—unlike parks—are not traditional public forums. But that surely cuts in the opposite direction. Traditional public forums are where speech restrictions are most strictly scrutinized. The fact that parks had been held since "time immemorial" to be places of public speech was a hurdle for the city in *Summum*. That is, the city won in *Summum despite* the fact that public parks are traditional public forums, not *because* they are public forums.

attempt to distinguish *Summum* ultimately devolves to manifesting a conclusion in search of a reason. However insignificant one might find the dispute before us, the law entitles Texas to a judgment in its favor. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
July 14, 2014

Lyle W. Cayce
Clerk

No. 13-50411

D.C. Docket No. 1:11-CV-1049

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually; RAY W. JAMES, Individually,

Plaintiffs - Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants - Appellees

Appeals from the United States District Court for the Western District of Texas, Austin

Before SMITH, PRADO, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

JERRY E. SMITH, Circuit Judge, dissenting.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.; GRANVEL J. BLOCK; and RAY W. JAMES,

Plaintiffs,

-vs-

VICTOR VANDERGRIFF in his official capacity as Chairman of the Texas Department of Motor Vehicles Board; CLIFFORD BUTLER in his official capacity as a member of the Board; RAYMOND PALACIOS, JR. in his official capacity as a member of the Board; BLAKE INGRAM in his official capacity as a member of the Board; CHERYL JOHNSON in her official capacity as a member of the Board; LAURA RYAN in her official capacity as a member of the Board; MARVIN RUSH in his official capacity as a member of the Board; and JOHN WALKER, III, in his official capacity as a member of the Board,

Defendants.

Case No. A-11-CA-1049-SS

ORDER

BE IT REMEMBERED on this day the Court reviewed the file in the above-styled cause, and specifically Plaintiffs Texas Division, Sons of Confederate Veterans, Inc, et al. (SCV)'s Motion for Summary Judgment [#35], Defendants Victor T. Vandergriff et al. (DMVB)'s[1] Response [#38] thereto; the DMVB's Motion for Summary Judgment [#37], the SCV's Response [#39] thereto, and the DMVB's Reply [#43]. Having considered the documents, the file as a whole, and the governing law, the Court now enters the following opinion and orders.

BACKGROUND

The issue before the Court is this: does the First Amendment require a state government to place the Confederate battle flag on customized, special license plates at the request of a nonprofit organization which has otherwise complied with state rules governing issuance of such plates? The Plaintiffs are the Texas Division of the Sons of Confederate Veterans, Inc., an organization dedicated to preserving the memory of those Americans who fought for the Confederacy during the Civil War, as well as the present and former "Commanders" of the Texas Division of the SCV. The SCV's membership is limited to male descendants of Confederate veterans. The Defendants are the board members of the Texas Department of Motor Vehicles Board, and are sued in their official capacities. Among its many duties,

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[1] The Court will refer to the Defendant board members of the Board of the Texas Department of Motor Vehicles collectively as the "DMVB" in this opinion.

the DMVB is tasked with final approval of proposed "specialty license plates." The SCV claims its First Amendment rights have been violated by the DMVB's refusal to issue a proposed Sons of Confederate Veterans specialty license plate. The SCV's seal prominently incorporates the Confederate battle flag, which is the flag Confederate troops fought under during most of the Civil War, and which is also the flag most closely associated with the Confederacy in popular memory.[2] The SCV seeks to compel the DMVB to approve its specialty license plate, featuring the name and seal of the Sons of Confederate Veterans organization. Apparently, the SCV has successfully had similar plates issued by the states of Alabama, Georgia, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. Pls.' Am. Compl. [#10] ¶ 4.18. The Court will now describe in turn (1) the various ways in which the state of Texas issues specialty license plates, (2) the Confederate battle flag and its significance, and (3) the SCV's applications to obtain a specialty plate, the denial of which underlie this case.

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[2] As its name suggests, however, the battle flag was not the national flag of the Confederacy, but rather was adopted for field use because—when viewed at a distance, and through the smoke of battle—the first national flag of the Confederacy could not be readily distinguished from the American flag borne by Union troops. This accounts for the (immaterial) dispute before the DMVB (discussed below) as to whether the battle flag was ever "flown over" the state of Texas as a sovereign flag. It does bear noting the second and third Confederate national flags both prominently incorporated the battle flag in their cantons. Pls.' Mot. Summ. J. [#35] at 3.

I. The Specialty Plate Programs

Texas has three avenues by which individuals or organizations may apply for the creation of a new specialty plate.[3] The first way is through direct legislative action, by which the Texas legislature authorizes specific plates. These plates are codified in Chapter 504, subchapter G of the Transportation Code. TEX. TRANSP. CODE §§ 504.601, .602–662; *e.g.*, *id.* § 504.662(a) ("The department shall issue specially designed license plates that include the words 'Choose Life.' The department shall design the license plates in consultation with the attorney general."). Taking the latter as an example, $22 from the sale and renewal of each "Choose Life" plate goes to a fund administered by the Texas Attorney General, to support nonprofit organizations which provide free "counseling and material assistance to pregnant women who are considering placing their children for adoption," and which do not provide abortion-related services. *Id.* § 504.662(b); TEX. GOV'T CODE § 402.036(g). Most of the other statutory plates relate to less controversial subjects, and apparently the Texas Department of Transportation, which previously reviewed proposed specialty plates, repeatedly rejected

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[3] Regardless of their origin, once a plate is approved, drivers pay an extra fee in addition to the regular vehicle registration fee to obtain the desired specialty plate. 43 Tex. Admin. Code § 217.28(b)(2). The proceeds from the fee are divided in various ways depending on how the plate was created, but typically funds benefit both the entity which proposed the plate, and a state agency with similar goals. For example, proceeds from the SCV's proposed plate would have benefitted both the SCV itself, and its sponsoring state agency, the General Land Office, for the purpose of preserving historical monuments and records.

"Choose Life" designs as being too controversial, under prior regulations. Pls.' Mot. Summ. J. [#35-8], Ex. F, at 6. Like the DMVB-approved plates discussed below, statutory plates are available to the public through the DMVB's website.

The second route, at issue here, is through an agency approval process, originally overseen by the Texas Department of Transportation, but then assigned to the Department of Motor Vehicles Board. TEX. TRANSP. CODE § 504.702. Throughout this opinion, the Court will typically mean this program, supervised by the DMVB, when referencing the "specialty plate program." This route is limited to nonprofit organizations. *Id.* § 504.801(b). If the nonprofit group's plate is approved, a share of the proceeds from sales of the plate is given to the nonprofit. Although the statute states, "[t]he department shall design each new specialty license plate in consultation with the sponsor, if any," *id.* § 504.801(c), by rule and practice nonprofit groups, such as the SCV, propose the design, while the DMVB's input appears to be limited to (1) technical reformatting of a design to enable it meet visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a specialty plate. Entities seeking approval of a plate by the DMVB may affiliate with a state agency as a sponsor,[4] in which case a share of the proceeds (less administrative costs of

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[4] Confusingly, the statute refers to plate applicants as sponsors, while certain DMVB publications refer to the affiliated state agency supporting the plate as the sponsor. The Court will generally use "sponsor" to refer to any affiliated state agency, and "applicant" to refer to the nonprofit entity seeking issuance of a specialty plate.

$8) from sales of the plate ($22 per plate) goes to the state agency, which in turn passes on a portion to the nonprofit entity.[5] *Id.* § 504.801(e). Otherwise, all proceeds go to the state highway fund. *Id.* Nonprofit organizations proposing a specialty plate must pay an $8,000 deposit to cover the administrative costs for the first 1000 plates sold, which is reimbursed if plate sales and renewals exceed 1000.

Both statutes and regulations govern the DMVB's review of proposed plates. "The department may refuse to create a new specialty license plate *if the design might be offensive to any member of the public*, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule." *Id.* § 504.801(c) (emphasis added). Pursuant to the foregoing, the DMVB has promulgated rules which incorporate section 504.801, and which also direct the DMVB to consider the following:

> (B) the proposed license plate design, including:
>
> (i) whether the design appears to meet the legibility and reflectivity standards established by the department;
>
> (ii) whether the design meets the standards established by the department for uniqueness;

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[5] Because the SCV seeks to compel issuance of its proposed plate, which would therefore result in additional revenue for the state, the Court previously rejected DMVB's argument this suit is barred by the Tax Injunction Act. Order of Mar. 7, 2012 [#27] at 6.

(iii) other information provided during the application process;

. . .

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code[] § 504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

43 TEX. ADMIN. CODE § 217.28(i)(5)(B)–(C).

In addition, the prior version of the DMVB rules, in effect when the SCV plate was rejected, also included factors under which a plate could be considered offensive under Transportation Code section 504.801(c). As relevant here, one factor was whether the plate was "derogatory," defined as an "an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions." Former 43 TEX. ADMIN. CODE § 217.28(c)(3); Pl.'s Mot. for Summ. J. [#35-12], Ex. J, at 1.

Once an application is complete, the DMVB makes the proposed design available for public comment on its website. 43 TEX. ADMIN. CODE § 217.28(i)(6). No sooner than twenty-five days thereafter, the proposed plate is considered as an agenda item at a DMVB meeting. *Id.* The DMVB, at an open meeting, then determines whether to approve or reject the proposed design. *Id.* § 217.28(i)(7)(A). Even if a design is approved, the DMVB "has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or li-

cense plate specifications." *Id.* § 217.28(i)(8)(B). When a design is rejected, the DMVB will consider an amended design, in a new application, if "the design has been altered to an acceptable degree." *Id.* § 217.28(i)(7)(B)(ii).

Third, the state has also authorized a private vendor, MyPlates.com, to accept new plate applications, and to sell specialty plates to the public, through its own website.[6] Unlike the DMVB's program, this avenue is open to everyone, including for-profit entities. The DMVB nevertheless must approve designs submitted through MyPlates.com. TEX. TRANSP. CODE § 504.6011(a); 43 TEX. ADMIN. CODE § 217.40. The majority of the designs offered by MyPlates.com either offer a different color and style from the standard Texas plate, or bear the logo and name of assorted colleges, universities, and professional sports teams.[7] However, a number of plates displaying the names and logos of nonprofit and for-profit entities are also available, including such stalwart enterprises as Mighty Fine burgers, Freeb!rds burritos, and RE/MAX ("GET IT SOLD WITH RE/MAX"). Pl.'s Mot. Summ. J. [#35-13], Ex. K, at 1; *see also* MYPLATES.COM, http://www.myplates.com/ (last visited Apr. 9, 2013). No-

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[6] As such, the motorist—or jurist—who wishes to review the full range of available plates must peruse two different websites.

[7] Including, in a rather odd juxtaposition (but one which is no doubt popular among persons who, not having been fortunate enough to be born (or to attend school) in Texas, nevertheless got here as soon as possible), many designs for colleges and teams which are located outside the state of Texas. For example, persons who had the good fortune of attending the University of Kansas can purchase a Texas plate which features a certain blue and red bird, and the legend, "JAYHAWKS." MyPlates.com, http://www.myplates.com/ (last visited Apr. 9, 2013). The parties have not suggested the Jayhawks plate is an endorsement of the historical Jayhawkers, however.

tably, one nonprofit plate, available through MyPlates, is the "Calvary Hill" plate, sales of which "benefit at-risk Texas children." *Design Series*, MYPLATES.COM, http://www.myplates.com/DesignSeries/PLPD236 (last visited Apr. 9, 2013). The design of the Calvary Hill plate features the legend "ONE STATE UNDER GOD," and, with obvious Christian symbolism, a silhouette of three crosses on a small rise. *Id.*; Pl.'s Mot. Summ. J. [#35-13], Ex. K, at 1.

II. The Confederate Battle Flag

The Confederate battle flag is a symbol which conveys different meanings to different audiences. *See A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 222 & n.5 (5th Cir. 2009) ("As an initial matter, plaintiffs agree that some view the Confederate flag in certain circumstances as a symbol of racism and intolerance, regardless of whatever other meanings may be associated with it. This concession comports with other courts' views of the meanings associated with the Confederate flag."). To some—including, but by no means limited to, the SCV and its members—the flag is a symbol of pride, heritage, and sacrifice in a noble struggle to preserve states' rights, and an agrarian way of life. However, to others it is a symbol of an unconstitutional rebellion, aimed at keeping African-Americans in a state of slavery by destroying the Union, with the "states' right" at issue being the right to own slaves. Unfortunately, it is also used by some modern racists and white supremacists as a symbol of hatred directed towards African-Americans, some of whom in turn ascribe to it a racist meaning.[8] *See,*

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[8] As the Eleventh Circuit noted:

Continued ...

e.g., *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (noting the battle flag has multiple "emotionally charged" meanings, and is viewed by some as a symbol of white supremacy and racism, while others view it as a positive symbol of heritage).

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, the flag is identified with ra-

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This debate, which is being played out in state legislatures, newspaper editorial columns and classrooms across the South is exemplified in the expert witness disclosures offered by the two sides in this case. The plaintiffs' experts plan to testify that "the Confederate battle flag is not a symbol of racism, but rather a historical symbol embodying the philosophical and political principals of a decentralized form of government in which states and local government retain all powers not expressly ceded to the centralized federal government under the constitution" and that thus the flag is merely "a symbol of southern heritage." The defendant's expert plans to testify that "from its inception, the confederacy was a political movement dedicated to the preservation of the institution of slavery. Therefore from its inception, the confederacy and its symbols represented approval of white supremacy" and that "the confederate flag is a symbol that has acquired numerous racist associations to the point that the flag itself has understandably come to be perceived as a racist symbol."

The problem, of course, is that both of them are correct.

Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246, 1248–49 (11th Cir. 2003) (citations omitted).

> cial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African–Americans.

United States v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001) (per curiam).

The Eleventh Circuit has noted white supremacists began to adopt the battle flag during the civil rights movement, as a symbol of opposition to efforts by the federal government to bring about desegregation. *Coleman v. Miller*, 117 F.3d 527, 528 (11th Cir. 1997).

> As many of Georgia's politicians and citizens openly resisted the Supreme Court's desegregation rulings, increasing numbers of white Southerners began expressing renewed interest in their Confederate heritage. It was in this environment of open hostility to the Supreme Court's civil rights rulings and of developing interest in Confederate history that the Georgia General Assembly acted to redesign its state flag. It chose as an official state symbol an emblem that historically had been associated with white supremacy and resistance to federal authority.

Id. At issue in *Coleman* was an Equal Protection and First Amendment challenge to the Georgia state flag, adopted in 1956, which included the battle flag, along with the state seal. Indeed, although several legislators did testify to the contrary, one member of legislature asserted the Georgia General Assembly had deliberately incorporated

the battle flag into the state flag "as a symbol of resistance to integration."[9] *Id.* at 528. "James Mackay, who was a member of the General Assembly in 1956, testified that 'there was a movement across the South: "Let's adopt the Confederate battle flag as a symbol of resistance to the law of this land."'" *Id.* at 529 n.4. The Eleventh Circuit ultimately rejected the challenge, finding a lack of evidence of any disproportionate impact along racial lines or of any government compulsion to endorse the state flag. *Id.* at 530–31. However, the court was not shy about noting the following regarding the meaning of the Confederate battle flag:

> We recognize that the Georgia flag conveys mixed meanings; to some it honors those who fought in the Civil War and to others it flies as a symbol of oppression. But because the Confederate battle flag emblem offends many Georgians, it has, in our view, no place in the official state flag. We regret that the Georgia legislature has chosen, and continues to display, as an official state symbol a battle flag emblem that divides rather than unifies the citizens of Georgia.[10]

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[9] Notably, "while addressing the States' Rights Council of Georgia at the beginning of the 1956 legislative session, Governor Griffin announced that 'the rest of the nation is looking to Georgia for the lead in segregation.'" *Coleman*, 117 F.3d at 528. In addition, while it was considering the flag bill, the General Assembly passed the Interposition Resolution, declaring the Supreme Court's rulings in *Brown v. Board of Education* to be null and void. *Id.*

[10] Although legal efforts to remove the battle flag failed, the Georgia Assembly appears to have ultimately agreed, and adopted a new flag in 2001, which relegated the battle flag to a tiny lineup of former

Continued ...

Id. at 530.

The SCV's predecessor, the United Confederate Veterans, whose members were actual veterans of the Civil War, used the battle flag as its symbol. Since at least 1924, the SCV has in turn used a logo which includes the battle flag, surrounded by four tabs containing the words "Sons of Confederate Veterans 1896." Pl.'s Mot. Summ. J. [#35-5], Ex. C, at 4. There is no dispute the battle flag logo is the only logo used by the SCV, although local divisions sometimes add additional elements to it. In an apparent reaction to negative associations with the battle flag, the Sons of Confederate Veterans nationally adopted a resolution on September 3, 2010, unequivocally condemning "misuse of the Confederate Battle Flag by any extremist group or individual espousing political extremism and/or racial superiority," and denouncing "the use of the Confederate Battle Flag and any other Confederate symbol by any hate group and/or the Ku Klux Klan as the desecration of a symbol to which any hate group and/or the Ku Klux Klan has no claim." Defs.' Mot. Summ. J. [#37-4], Ex. 7, at 195.

III. Sons of Confederate Veterans' Plate Applications

The SCV applied to the Texas Department of Transportation (TxDOT)—which was then in charge of specialty plate approval—for a plate on August 18, 2009. Pls.'s Mot. Summ. J. [#35-4], Ex. B, at 1. Texas Land Commis-

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state flags along the bottom edge of the 2001 flag. Yet another flag was adopted by referendum in 2003, which abandoned the battle flag altogether, albeit in favor of a design apparently inspired by the first Confederate national flag. Edwin L. Jackson, *State Flags of Georgia*, NEW GEORGIA ENCYCLOPEDIA (Mar. 3, 2009), http://www.newgeorgiaencyclopedia.org/nge/Article.jsp?id= h-2671&hl=y.

sioner Jerry Patterson, on behalf of the Texas General Land Office, sponsored the application. *Id.* The proposed plate featured the SCV logo, and the legend "SONS OF CONFEDERATE VETERANS" at the bottom. *Id.* [#35-10], Ex. H., at 1. The Sons of Confederate Veterans specialty plates issued by other states include similar or identical versions of the logo, and several likewise repeat the name of the organization at the top or bottom of the plate. *Id.* [#35-3], Ex. A, at 1–5. There is no dispute the SCV's plate complied with the various technical requirements, and there is no dispute the SCV stands ready then and now to pay the $8,000 deposit.

TxDOT, after acknowledging receipt of the application, proceeded to put the plate to an anonymous vote by its seven-member special committee for reviewing proposed plates, via an internal website. *Id.* [#35-2], Ex. 1, at 3. On December 21, 2009, TxDOT sent SCV a letter denying the plate. Via an open-records request, the SCV subsequently obtained internal TxDOT emails regarding the plate, which revealed at one point the voting stood 3–2 in favor of the SCV plate, but with two members failing to vote, despite repeated pleas to do so by TxDOT officials. Although TxDOT officials debated whether the plate had been approved by the three votes, the plate was not moved to the public comment period required under the prior TxDOT regulations, but was instead held for a second vote, at which time the vote was 4–1 against the plate, two TxDOT committee members apparently being still too busy to click an online voting button.

Subsequently, review of specialty plate applications was transferred to the newly created, nine-member

DMVB. On October 27, 2010, the SCV sent a renewed application to the DMVB, accompanied with a cover letter decrying apparent bias by TxDOT officials. Although the SCV characterizes this action as an "appeal," there is no statutory or regulatory basis for treating it as an appeal. In any event, the DMVB, proceeding under the regulations described above, treated it as a new application, and opened the plate for public comment. The DMVB apparently approved the plate as to visibility and technical requirements on March 18, 2011. *Id.* Final review of the plate was placed on the agenda for an April 14, 2011 DMVB meeting. At the April meeting, one board member was absent, and the remaining eight members deadlocked 4–4 in two votes. DMVB Chairman Vandergriff apparently sought to reschedule the agenda item for a meeting with all boardmembers in attendance, however various personal difficulties frustrated this, and the SCV plate was ultimately taken up on November 10, 2011, again by only eight DMVB members.

This meeting was apparently well-attended by members of the public, and elicited numerous public comments, some in favor, but most opposed to the plate (which the Court will describe in more detail below). In the months leading up to the November hearing, the DMVB's website also recorded several hundred public comments, the balance of which were against the plate. Defs.' Mot. Summ. J. [#37-2], Ex. 4, at 1. Further, the DMVB received several letters urging rejection of the plate, including from nineteen state representatives, and the mayor of Houston. *Id.* [#37-3], Ex. 5.

Also before the DMVB on November 10, with remarkable timing, was another plate sponsored by Commissioner Patterson, the Buffalo Soldiers plate.

This plate was sought by the Buffalo Soldiers National Museum. The Museum honors all African-American soldiers throughout American history, albeit with a focus on the "Buffalo Soldiers," a term referring to those who joined the federal army after the Civil War, and served in the nineteenth-century frontier wars with Native Americans. The Buffalo Soldiers plate features a combined image, incorporating both the Buffalo Soldiers Museum logo (which in turn contains an image of a buffalo, and the words "Buffalo Soldiers National Museum, Houston, Texas") and another logo, comprised of a crossed rifle and sabre, with the words "Buffalo Soldiers" in large, cursive script superimposed. As noted below, some of the comments regarding the SCV plate also referenced the proposed Buffalo Soldiers plate, and the DMVB voted on both in close succession.

After receiving many public comments, the DMVB rejected the SCV plate by unanimous vote.[11] This decision was memorialized in a resolution, which made the following findings:

> Transportation Code, §504.801(c) authorizes the Board to refuse to create a new specialty license plate if the design might be offensive to any member of the public or for any other reason established by rule. The provision of Title 43, Texas Administrative Code, §217.28(c)(3) lists factors under which a license plate may be considered objectionable or misleading. The objectionable factors include, but are not limited to whether the plate is found to be derogatory.

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[11] The Buffalo Soldiers plate was approved 5–3, and is now available for purchase by Texas motorists.

> "Derogatory" is defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions.
>
> The Board has considered the information and finds it necessary to deny this plate design application, *specifically the confederate flag portion of the design*, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Pls.' Mot. Summ. J. [#35-12], Ex. J., at 1 (emphasis added). The DMVB resolution also included an alternative reason for denying the SCV plate:

> The Board also finds there is a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue. The department shares a common public mission with several state agencies to protect public safety. The extent of the controversy surrounding this plate may challenge public safety since the design could distract or disturb some drivers to the point of being unreasonably dangerous.

Id. at 1–2.

The SCV then filed suit in this Court, asserting its First Amendment rights were violated by the DMVB.

Presently, both sides have moved for summary judgment.

DISCUSSION

I. Legal Standards

A. Summary Judgment

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Washburn v. Harvey*, 504 F.3d 505, 508 (5th Cir. 2007). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Washburn*, 504 F.3d at 508. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254–55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to

defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

B. First Amendment Forum Analysis

The Supreme Court distinguishes between three or four types of forum for First Amendment purposes. The first is the traditional public forum, such as "streets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515

(1939)). The second category, often referred to as the designated public forum, "consists of public property which the state has opened for use by the public as a place for expressive activity." *Id.* In both traditional and designated public forums, the "rights of the state to limit expressive activity are sharply circumscribed."[12] *Id.* In these forums, "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* "The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

A third category, or perhaps a subset of the second, is the limited public forum. *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345–47 & ns.10–12 (5th Cir. 2001) (noting a lack of precision in use of "designated" and "limited" terminology, and the resulting confusion). "A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." *Perry Educ. Ass'n*, at 46 n.7 (citations omitted). Notwithstanding some confusion on terminology, as the Court understands matters, a limited forum is a nontraditional forum, which is additionally restricted to

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[12] The only practical difference between traditional and designated public forums appears to be the state's power to entirely close a designated public forum; i.e., having created a designated forum, the state is not required to keep it open forever. *Perry Educ. Ass'n*, 460 U.S. at 46. By contrast, the state cannot "prohibit all communicative activity" in a traditional public forum—public squares, parks, and the like, must forever remain open for public discourse. *Id.* at 45.

certain groups or to particular topics. *Id.* "When a public body establishes a limited public forum of this sort, that body may restrict the expression that takes place within the forum so long as the restriction (1) does 'not discriminate against speech on the basis of viewpoint' and (2) is 'reasonable in light of the purpose served by the forum.'" *Chiu*, 260 F.3d at 346 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001)).

Finally, there is the nonpublic forum, which would appear to be the balance of government owned or controlled property on which expressive activity (usually incidental to other, primary purposes) takes place. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). "[T]he mere fact that an instrumentality is used for the communication of ideas does not make [it] a public forum." *Perry Educ. Ass'n*, 460 U.S. at 49 n.9.

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property,

> has power to preserve the property under its control for the use to which it is lawfully dedicated."

Id. at 46 (citations omitted). The Supreme Court subsequently expounded on nonpublic forums as follows:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. For example, in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. The policy evidenced a clear intent to create a public forum .... Additionally, we noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum. And in *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976), the Court held that a forum for citizen involvement was created by a state statute providing for open school board meetings. Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater

were designed for and dedicated to expressive activities.

Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government." We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. Similarly, the evidence in *Lehman v. City of Shaker Heights*, revealed that the city intended to limit access to the advertising spaces on city transit buses. It had done so for 26 years, and its management contract required the managing company to exercise control over the subject matter of the displays. Additionally, the Court found that the city's use of the property as a commercial enterprise was inconsistent with an intent to designate the car cards as a public forum. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations, and jailhouse grounds, do not constitute public fora.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802–04 (1985) (certain citations omitted). From the foregoing, the following factors for consideration can

be distilled: (1) the policy and practice of the government, (2) the nature of the property, (3) limited access, (4) the property's compatibility with expressive speech, and (5) any evidence of contrary intent. *See id.* As the Fifth Circuit has cogently put it: "The government does not create a public forum merely by permitting some speech." *State of Tex. v. Knights of the Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995).

When the forum is nonpublic, the First Amendment still applies—albeit with reduced force. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry Educ. Ass'n*, 460 U.S. at 49. "The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.*

Courts must uphold a governmental restriction on speech in a nonpublic forum as long as the restriction is reasonable and viewpoint-neutral. *See id.* at 46; *Cornelius*, 473 U.S. at 800; *see also Perry v. McDonald*, 280 F.3d 159, 170 (2d Cir. 2001) ("For instance, a state might be permitted to prohibit speech on scatalogical subjects, but it may not be able to prohibit the expression of particular views about such subjects."). However, even in nonpublic forums, content regulations "must be scrutinized more carefully to ensure that communication has not been prohibited '"merely because public officials disapprove the speaker's view."'" *U.S. Postal Serv.*, 453 U.S. at 132 (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result))). However, "[t]he fact that the State wishes to exclude only one group with a certain view-

point does not alone make the exclusion viewpoint-based." *Knights of the Ku Klux Klan*, 58 F.3d at 1081. Where the forum in question is comprised of or located on government property, the court's analysis must be mindful of "the special interests of a government in overseeing the use of its property." *See Consol. Edison Co.*, 447 U.S. at 539–40.

II. Application

There are no disputed material facts in this case. Rather, the case wholly turns on a matter of law—whether the First Amendment required the DMVB to accept the SCV's specialty plate application. The DMVB raises two lines of defense for its denial of SCV's proposed plate. First, the DMVB argues specialty plates constitute government, rather than private, speech, and are therefore not protected by the First Amendment at all. Alternatively, DMVB argues the specialty plates constitute only a limited public forum, or a nonpublic forum, and thus the SCV's application was properly rejected pursuant to viewpoint-neutral restrictions on content. For the reasons given below, the Court rejects the first argument, but finds the second is well taken, as the record shows the specialty plate program is a nonpublic forum.

The Court will first determine whether the speech in question is government speech, before considering what type of forum the specialty plate program is under the First Amendment. The Court will then address whether the regulations and state action in this case constitute viewpoint, or content, regulation, and if the restriction was a reasonable limitation. Finally, the Court will explain why two prior decisions in the SCV's favor are unavailing here, before noting the same result would apply even if

the specialty plate program constitutes a limited public forum.

A. Government or Private Speech

As a threshold issue, the Court must determine whether the speech in question is government or private speech. If it is government speech, then the First Amendment is inapplicable. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 468 (2009) ("If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). The DMVB, citing *Pleasant Grove*, argues the program is government speech because the state, through the DMVB, retains final control over the content of specialty plates. The DMVB further invokes Fifth Circuit cases, which have generally noted, citing *Pleasant Grove*, and *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the government "must exercise a high degree of control over speech" for "private speech to become the government's own." *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 360 (5th Cir. 2010) (holding government support of marches did not transform the marches into government speech); *see also Pelts & Skins, LLC v. Landreneau*, 448 F.3d 743, 743–44 (5th Cir. 2006) (vacating and remanding, in light of *Johanns*, for determination of whether "Louisiana's alligator marketing program" was government speech, similar to the pro-beef advertising in *Johanns*, because of the degree of governmental control over the message).

The Court disagrees. There is no dispute the content of specialty plates is proposed by the private, nonprofit

entities who seek to have a specialty plate issued. Although the DMVB exercises *final* control over whether any particular plate is accepted, and further ensures the content and formatting of proposed plates conforms with the various regulations, the reality is private groups, not the government, compose the message to be placed on the specialty plates. *See* Defs.' Mot. Summ. J. [#37-2], Ex. 3 (specialty plate brochure), at 2 ("Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards. Depending on which approval route you choose, My Plates or TxDMV will work with your organization to help you understand those standards."). The DMVB essentially acts as an editor, with right of refusal to publish, rather than as a speaker.

The DMVB asserts the Supreme Court placed final control at the center of government-speech analysis in *Pleasant Grove*. However, this reads too much into the *Pleasant Grove* opinion, which was focused on the very different, and rather narrow, question of whether privately donated monuments placed in a public forum constitute government or private speech. 555 U.S. at 464. The Supreme Court, noting (1) the limited space within parks, (2) the permanent nature of monuments, and (3) the import of the act of accepting a particular monument—which can operate as an endorsement of the message conveyed by the monument—found such monuments to be government speech. *Id.* at 472–73, 478. It is true the Supreme Court emphasized the government retained effective control over the message. However, the court's analysis, distinguishing permanent monuments from speeches or marches, precludes any finding the specialty plates are government speech. The Su-

preme Court distinguished monuments from speeches or other traditional First Amendment activities in public parks, because "public parks can accommodate only a limited number of permanent monuments." *Id.* at 478.

> Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators—often, for all who want to speak—but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Id. at 479. Nor does *Pleasant Grove* purport to set out an "effective control" litmus test for whether speech is private or government. Rather, the city's control over the monuments in question appears to have simply been one consideration, albeit an important one, in finding the monuments constituted government speech. Nor is there any indication the *Pleasant Grove* opinion was intended to supplant the Supreme Court's then-recent explanation of government speech set forth in *Johanns*, discussed below, in which the speech was directed by the government "from beginning to end." 544 U.S. at 560–61.

Here, by contrast, there is practically no limit to the number of specialty plates the state could approve and issue, because putting a particular specialty plate on one person's car in no way precludes the placement of a different plate on a different vehicle. The plates do not

"monopolize" public space. *See id.* Indeed, a review of the DMVB's website shows some seventy-four plates for various nonprofit organizations are presently available, and no doubt more are on the way.[13] *See TxDMV–Special Plate Order Application*, TEX. DEP'T OF MOTOR VEHICLES, https://rts.texasonline.state.tx.us/NASApp/txdotrts/SpecialPlateOrderServlet?grpid=60 (last visited Apr. 8, 2013). Nor do specialty plates endure as do permanent monuments—they are only issued and renewed for so long as a driver continues to pay the annual $30 additional fee. Finally, the act of issuing specialty plates does not have the same import as the "dramatic" act of accepting a monument in a public park. *See Pleasant Grove*, 555 U.S. at 474 (noting the city's decision to accept and display a privately funded monument constituted a "dramatic form of adoption" of the message conveyed by the monument). As such, the special concerns which informed the holding in *Pleasant Grove* are wholly absent in this case, and the various specialty plates are more akin to speeches and other transitory uses of First Amendment forums, than to permanent monuments.

The DMVB also relies on *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006), in which the Sixth Circuit found a special license plate constituted government speech. However, *Bredesen* is factually distinct from this case, and actually illustrates why the SCV's plate is not government

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[13] And this is not counting the bewildering array of available "MyPlates," *see* MYPLATES.COM, http://www.myplates.com/ (last visited Apr. 9, 2013), or other plates available through the DMVB, memorializing colleges, universities, and sports teams.

speech. There, the challenged specialty plate was created at the express and specific direction of the Tennessee legislature. *Id.* ("In 2003, the Tennessee legislature passed a law . . . authorizing issuance of a specialty license plate with a 'Choose Life' logotype 'designed in consultation with a representative of New Life Resources.'"). In other words, it was a plate akin to the various plates directly authorized by the Texas legislature, not the specialty plate program the SCV applied under. Although the Tennessee legislature did assign the design work to a private party—New Life Resources—the fact remains the plate was created because the legislature passed a specific act making it so. *See id.* ("The Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated."). Here, by contrast, no act of the Texas legislature specifically authorized the SCV's plate—if it had, this lawsuit would not have occurred.

In addition, finding the specialty plate program is private speech comports with the Supreme Court's holding in *Johanns v. Livestock Marketing Ass'n*, where the court found "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government," because "Congress has directed the implementation of a 'coordinated program'" to promote beef consumption. 544 U.S. 550, 560–61 (2005). There, Congress and the Secretary of Agriculture directed "in general terms" what message was to be conveyed. *Id.* at 561. The entity charged by Congress to promote beef consumption, the Beef Board, was "answerable" to the government, in that it was composed of members who were all subject to removal by the Secretary, and half of whom were appointed by the Secretary.

Id. at 560–61. By contrast, here neither the Texas legislature, nor the DMVB, initiate the content of the DMVB-approved specialty plates. Nor are the private nonprofit entities—the ones who in fact propose the content of the plates—answerable to any part of the state government.

Finally, the Court notes the "government speech" doctrine is still relatively new, and its precise contours are uncertain. *Pleasant Grove*, 555 U.S. at 481 (Stevens, J., concurring). As such, Justice Souter cautioned (regarding the Supreme Court's finding monuments were government speech), "it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Id.* at 485 (Souter, J., concurring). The Court is heedful of this warning, particularly because Souter went on to say, in words which are apposite here:

> After today's decision, whenever a government maintains a monument it will presumably be understood to be engaging in government speech. If the monument has some religious character, the specter of violating the Establishment Clause will behoove it to take care to avoid the appearance of a flatout establishment of religion, in the sense of the government's adoption of the tenets expressed or symbolized. In such an instance, there will be safety in numbers, and it will be in the interest of a careful government to accept other monuments to stand nearby, to dilute the appearance of adopting whatever particular religious position the single example alone might stand for. As mementoes and testimonials pile up, however, the chatter may well make it less intuitively obvi-

> ous that the government is speaking in its own right simply by maintaining the monuments.
>
> If a case like that occurred, as suspicion grew that some of the permanent displays were not government speech at all (or at least had an equally private character associated with private donors), a further Establishment Clause prohibition would surface, the bar against preferring some religious speakers over others. But the government could well argue, as a development of government speech doctrine, that when it expresses its own views, it is free of the Establishment Clause's stricture against discriminating among religious sects or groups. Under this view of the relationship between the two doctrines, it would be easy for a government to favor some private religious speakers over others by its choice of monuments to accept.

Id. at 486–87 (citation omitted). The record in this case shows several specialty plates—approved and available to the public—contain references to God, or Christian symbols. Were the Court to find specialty plates are government speech, analogous to the monuments at issue in *Pleasant Grove*, then the scenario predicted by Justice Souter in 2009 has already come to pass.

The Court thus finds the contents of specialty plates are private speech. As such, First Amendment protection is available to the SCV, and the Court must proceed to determine what type of forum the plate program is.

B. Type of Forum

As a preliminary to First Amendment forum analysis, the Court concludes—and there appears to be no dispute—the forum at issue is the specialty plate program administered by the DMVB, and the plates themselves, not the separate MyPlates.com program, nor the public streets on which specialty plates are seen. This is because determining the relevant forum is based on the "access sought by the speaker." *Perry Educ. Ass'n*, 460 U.S. at 45; *see also Knights of the Ku Klux Klan*, 58 F.3d at 1078 (holding the forum in question was the "Adopt-a-Highway" program and its associated signs, rather than the public highways in general). However, in dispute is what type of forum the DMVB's specialty plate program is under First Amendment jurisprudence.

There is no suggestion the specialty plates are a traditional public forum. To the contrary, license plates, rather than being a place for people to gather, are discrete pieces of government-controlled property, serving the government's purposes of identifying vehicle ownership, regulating access to motor vehicles, and generating revenue. They are hardly venues for public debate since time immemorial. Instead, the question is whether the specialty plate program constitutes a designated public forum, a limited public forum, or a nonpublic forum.

Here, the record does not disclose any "clear intent" by the state of Texas to create a public forum. *Cornelius*, 473 U.S. at 802. Rather, the record shows the state, while allowing limited input from certain members of the public, has nevertheless "reserve[d] the forum for its intended purpos[e]." *Perry Educ. Ass'n*, 460 at 46. The state, via its agency, the DMVB, retains final control over the content of specialty plates. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 268–69 (1988) (noting school

retained ultimate control over the content of a school newspaper, and the purpose of paper was educational rather than expressive, as part of the course curriculum); 43 TEX. ADMIN CODE § 217.28(i)(7). In addition, although it is unclear whether the state retains formal title to the physical plates after they are issued, the state does retain ownership of the designs. TEX. TRANSP. CODE § 504.002. Moreover, the state exercises ongoing control over the physical disposition of all license plates. *See id.* § 504.008(g) ("If the owner of a motor vehicle for which a specialty license plate is issued disposes of the vehicle or for any reason ceases to be eligible for that specialty license plate, the owner shall return the specialty license plate to the department."); *id.* § 504.901 (providing for DMVB oversight of transfer of plates between vehicles, and further requiring "dispos[al] . . in a manner specified by the department," of any plates which are removed from a vehicle and not transferred to another); 43 TEX. ADMIN. CODE § 217.41(b)(2)–(3) (requiring plates which are not approved for transfer either be "disposed of in a manner that renders the license plates unusable or that ensures the license plates will not be available for fraudulent use on a motor vehicle," or retained by the owner of the vehicle they were removed from).

Any doubt is dispelled by assessing the indicia discussed in *Cornelius*, 473 U.S. at 802–04. First, Texas has limited participation in the DMVB-approved specialty plate forum to certain groups. Second, Texas, through the DMVB, retains full and final control over what messages are conveyed via the program. Third, the scope of speech which is possible through the program is very limited. Finally, the statute and regulations do not suggest the government's intent was to establish a public forum.

1. **Limited Access**

An important factor in determining if a forum is public or not is whether the government has limited who may participate in the forum. "In *Cornelius*, the Supreme Court noted that the government's consistent policy had been to limit participation in the fundraising campaign to certain voluntary agencies. The Court noted that this practice was inconsistent with an intent to create a public forum." *Knights of the Ku Klux Klan*, 58 F.3d at 1079 (citing *Cornelius*, 473 U.S. at 804). Similarly, participation in the DMVB's specialty plate program is limited to nonprofit entities. TEX. TRANSP. CODE § 504.801(b) ("Any nonprofit entity may submit an application . "); *id.* § 504.801(i) ("The sponsor of a new specialty plate may not be a for-profit enterprise."). This is confirmed by the fact the Texas legislature created two separate avenues for obtaining distinctive license plates with no such limitation, the so-called "MyPlates" program, and of course the possibility of lobbying members of the Texas legislature to create particular license plates by statute. These limitations are a strong indication the specialty plate program is not intended to be a public forum. *See id.*

This result is consistent with the Supreme Court's holding in *Perry Education Association*: "If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case." 460 U.S. at 47. Here the state has neither by policy, nor practice, opened the specialty license plate program to indiscriminate use by the general public. Rather, only qualified nonprofit entities are eligible. *See id.* ("We can only conclude that

the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum."). A further limitation is applicants must obtain the sponsorship of a state agency to receive the monetary benefits of the program.

2. State Control

There is no dispute the DMVB retains the final say on any proposed specialty plate, both as to the final form, and as to whether a plate should issue at all. 43 TEX. ADMIN. CODE § 217.28(i)(7). This is a further indication the specialty plate program is a nonpublic forum. *See Cornelius*, 473 U.S. at 803; *Knights of the Ku Klux Klan*, 58 F.3d at 1078.

3. Limited Scope of Speech

As a practical matter, the scope of speech permitted within the specialty plate program is very limited. This is due not only to the physical confines of a license plate, but also to the regulations governing specialty plate applications. Specialty plates may: (1) vary the color of the word "Texas" at the top, (2) apply a logo, within an area only a few square inches, on the left-hand side of the plate, (3) append twenty-five characters of text, in any color, at the bottom of the plate, and (4) optionally include or omit the silhouette of the state of Texas, in the upper right-hand corner. *See* Defs.' Mot. Summ. J. [#37-2], Ex. 2, att. A at 1 (specialty plate design template). As such, no detailed message or discussion is possible, or permitted.[14]

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[14] The Court is mindful a symbol alone, or even a single word, can Continued ...

To be sure, this factor is not dispositive alone, but it provides additional confirmation the specialty plate program is a nonpublic forum. *See Cornelius*, 473 U.S. at 802 ("The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent."); *Knights of the Ku Klux Klan*, 58 F.3d at 1078 ("Such limitations on the quantity and content of speech are indicative of an intent to maintain a nonpublic forum.").

4. No Expressed Intent to Create a Public Forum

A further factor is the absence of any expression of intent to establish a public forum. *Knights of the Ku Klux Klan*, 58 F.3d at 1078. For example, Chapter 504, subchapter A, entitled "General Provisions," and specifically section 504.008, "Specialty License Plates," contains no suggestion the legislature's purpose was to create a public forum. TEX. TRANSP. CODE § 504.008. Similarly, the relevant "Purpose and Scope" subsection of the Administrative Code merely references the DMVB's statutory duties to "issu[e] a plate or plates, . . that, when attached to a vehicle as prescribed by the department, act as the legal registration insignia," including specialty plates. 43 TEX. ADMIN. CODE § 217.28(a). The subsection goes on to explain, "For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures

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constitute protected speech under the First Amendment. The Court does not suggest the practical limits of what can be expressed on a license plate renders such speech unprotected. Rather, the limited scope of expression is simply one factor among several the Court looks to in determining whether the specialty plate program is a public forum. *See Cornelius*, 473 U.S. at 802.

for the application, issuance, and renewal of specialty license plates, symbols, tabs, and other devices, through the county tax assessor-collectors, and establishes application fees, expiration dates, and registration periods for certain specialty license plates." *Id.* Absent is any hint the legislature or the DMVB is seeking to further First Amendment expression. *See Knights of the Ku Klux Klan*, 58 F.3d at 1078 ("Any opportunity for speech provided by the Program is peripheral to that central purpose [of facilitating litter control].").

As such, viewed in light of the rubric elided in *Cornelius*, the record here fails to show any intent, clear or otherwise, to create a public forum.

Finally, this result is governed by the Fifth Circuit's holding in *Knights of the Ku Klux Klan*. There, the Court of Appeals determined the state's "Adopt-a-Highway" signs were a nonpublic forum. *Id.* at 1078–79. The Adopt-a-Highway signs were similar to specialty plates: both allow for little more than displaying the name of the participating entity. *Id.* It is true the specialty plate program also permits the display of a logo, and so does provide for a modestly increased degree of expression. However, in another sense the Adopt-a-Highway program was vastly more open than the specialty plate program, because for-profit entities could participate, whereas the specialty plate program at issue here is exclusively limited to nonprofit entities. *Id.* at 1079. The specialty plate program is further limited by the requirement—absent from the Adopt-a-Highway program—of a sponsoring state agency in order to obtain the full benefits of the program. Also much like specialty plates, "[t]he State restricts and controls the size and content of the [Adopt-a-Highway] signs posted at the ends of

the adopted miles." *Id.* Corresponding to the specialty plate program's approval process, all Adopt-a-Highway applications were subject to approval by the Department of Transportation. *Id.* Taking all of these factors together, the Court is constrained under Fifth Circuit precedent to conclude the specialty plate program is, like the Adopt-a-Highway program, a nonpublic forum.[15] *Id.* (holding the foregoing factors were "inconsistent with an intent to create a public forum").

Much as school newspapers, *Hazelwood Sch. Dist.*, 484 U.S. at 267–68, mail boxes, *U.S. Postal Serv.*, 453

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[15] SCV attempts, in a footnote, to distinguish *Knights of the Ku Klux Klan*, but its sole argument for doing so is the following: "[U]nlike the highway adoption program . . . the specialty license plate program was specifically created to allow for personal expression by sponsoring organizations and drivers, and has as one of its primary purposes 'the provision of a forum for expressive activity.'" Pls.' Resp. [#39] at 6 n.3 (quoting *Knights of the Ku Klux Klan*, 58 F.3d at 1078). However, the SCV cites no authority or evidence in the record showing a "primary purpose" of the specialty plate program was to provide a forum for expressive activity, other than a quote from the *Knights* opinion, which of course does not speak to the purposes of the specialty plates program. To the contrary, the evidence, and the laws and regulations governing the specialty plates program, suggest its primary purpose is to generate revenue. *See* TEX. TRANSP. CODE § 504.702(b)(2), (e) (requiring $8,000 deposit for specialty plate applications); TEX. ADMIN. CODE § 217.28(i)(2)(D), (E) (requiring inclusion of "projected sales of the plate, including an explanation of how the projected figure was established," and "a marketing plan for the plate, including a description of the target market," in all specialty plate applications); *id.* (i)(5)(C) (directing the DMVB to consider, *inter alia*, the applicant's ability to comply with the deposit requirement). Moreover, SCV's argument amounts to no more than begging the question of whether the specialty plates forum is some type of public forum.

U.S. at 129–130, interschool mail systems, *Perry Educ. Ass'n*, 460 U.S. at 46–47, government-organized, workplace charity drives, *Cornelius*, 473 U.S. at 806, and Adopt-a-Highway signs, *Knights of the Ku Klux Klan*, 58 F.3d at 1078–79, are all nonpublic forums,[16] the Court finds the specialty plate program is a nonpublic forum, as it is not a traditional public forum, nor does the evidence establish the government's "clear intent" to designate the program as a public forum.[17]

C. Viewpoint or Content Discrimination

As the specialty plate program constitutes a nonpublic forum, the next question is whether the DMVB nevertheless engaged in constitutionally impermissible viewpoint discrimination, or if rejection of the SCV's application was permissible content discrimination. Having carefully reviewed the record, and mindful of the duty to closely scrutinize purported content discrimina-

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[16] By contrast, Supreme Court cases which rejected attempts to characterize limited or designated forums as nonpublic forums involved physical locations which permitted actual discourse in a traditional sense. *See Cornelius*, 473 U.S. at 802–03 (noting university campus, open school board meetings, municipal auditorium, and city-leased theater were all physically compatible with use as public forums).

[17] Further support is found in the Second Circuit's decision in *McDonald*, where Vermont's vanity plate program was held to be a nonpublic forum because (1) the primary purpose of license plates is vehicle identification, (2) the vanity plate program was aimed at raising revenue, rather than facilitating expression, (3) the state retained numerous restrictions on the program, similar to those at issue here, (4) the state retained final control over any plate, and (5) the nature of the plates made them an "unlikely means" to engage in meaningful debate. 280 F.3d at 167–68.

tion to ensure it is not, in fact, viewpoint-based, *see U.S. Postal Serv.*, 453 U.S. at 132, the Court concludes the DMVB's decision was content, rather than viewpoint, based, and therefore not offensive to the First Amendment, *see Knights of the Ku Klux Klan*, 58 F.3d at 1080–81 ("There is no indication in the record that the State's attempt to prevent the Klan from adopting a section of highway outside of Vidor is actually motivated by a desire to suppress the Klan's viewpoint.").

The Supreme Court has repeatedly upheld content-based exclusions in nonpublic forums, and cautioned that not all government property is a public forum. *Jones v. N.C. Prisoners' Union*, 433 U.S. 119, 134 (1977) (holding a prison is not a public forum, and upholding regulations on most speech by purported prisoners' union); *Greer v. Spock*, 424 U.S. 828, 838–39 (1976) (holding federal military reservation was not a public forum, and approving of base policy which permitted other civilian speakers, but barred all political speakers); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (plurality opinion) (finding advertising cards on public transit system were not a public forum, and therefore upholding ban on any political advertising). Although the foregoing three cases arguably involved unusual facts, the Supreme Court affirmed these cases lie within the mainstream of First Amendment jurisprudence in *Perry Education Association*: "It will not do, however, to put aside the Court's decisions holding that not all public property is a public forum, or to dismiss *Greer*, *Lehman*, and *Jones* as decisions of limited scope involving 'unusual forums.'" 460 U.S. at 49 n.9. Nor is *Perry Education Association* the only case to acknowledge *Lehman* and *Greer*'s importance. *See Consol. Edison Co.*, 447 U.S. at 538

("Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances.... [T]his Court has recognized that the government may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated.").

SCV has no evidence the DMVB discriminated against it on the basis of viewpoint. Indeed, there is no hint in the record the defendant board members ever considered the SCV's viewpoint. Rather, their concerns were entirely focused on the appearance of the Confederate battle flag within the SCV's logo, finding "specifically the confederate flag portion of the design" to be derogatory. Pls.' Mot. Summ. J. [#35-12], Ex. J, at 1. This is mirrored by the public comments the DMVB based its finding on, which focused on the battle flag, not the group requesting the specialty plate. The closest thing to a criticism of the SCV itself was a comment by Gary Bledsoe, who argued, "though there are good people in the Sons of Confederate Veterans, there are many there who are appended to or connected with other hate organizations ...." Defs.'s Mot. Summ. J. [#37-4], Ex. 6 (Nov. 10, 2011, DMVB Board meeting transcript), at 25 [hereinafter Nov. Trans.]. All the other comments the DMVB received were directed at the battle flag itself, and its meaning. Rather than criticizing the SCV, or discussing its mission of commemorating the service of Confederate troops, the various negative commentators discussed the meaning of the battle flag.

First, the participants debated whether the battle flag had ever been flown "over" Texas, i.e., as the sovereign flag of the state, with General Land Office Commissioner Jerry Patterson explaining it was probably used in bat-

tles which occurred within the state, and certainly was carried by Texas troops in battle elsewhere, as part of the Army of Northern Virginia. Then, numerous participants, including Congressman Lloyd Doggett, and many African-Americans, particularly members of the NAACP and local pastors, forcefully expressed the opinion the battle flag is a symbol of racism, oppression, and division.[18] Similarly, many of the speakers warned putting the Confederate battle flag on a state-sanctioned license plate would make it appear the state endorsed racist views. These same commentators likewise opined Texas should be moving away from racial division, not towards it.[19] One speaker went so far as to suggest the Confederate

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[18] One example of these comments will suffice:

> When I was ten years old we walked to school, to the black school. There was a white school where the white kids rode the bus, there was another white school that was a private school, and every morning as we walked on the sidewalks as black people, the white private school would ride by in their bus very slowly, spit out the window in our faces and display a Confederate battle flag. Every year in our school when they talked about the death of M.L.K., the white kids would bring in the Confederate battle flag and hold it up as a symbol of power.
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> All my life in Georgia and Alabama and the whole South, it was very clear what the symbol meant. In fact, if you study the history of Geor[illegible]a and Alabama, you see crime[] scenes where black folks were lynched, murdered and killed, and other relics like the flag were always on display.

Nov. Trans. [#37-4] at 53–54 (comments of Nelson Linder).

[19] The letters from nineteen state representatives, and the mayor of Houston, were in a similar vein to the sentiments summarized in the preceding three sentences. *See* Defs.' Mot. Summ. J. [#37-3], Ex. 5

battle flag and the Nazi swastika are "one and the same." *Id.* at 56. In what may have been a bit of shameless showboating, or perhaps a moving and emotional moment at the meeting (the cold record cannot convey the atmosphere), Congressman Al Green opined American troops serving in Afghanistan and Iraq fought for the American flag, not the Confederate flag, and proceeded to lead the audience in the pledge of allegiance. Finally, Congresswoman Sheila Jackson Lee echoed several of the above sentiments, and also suggested rejecting the SCV's application would not violate the First Amendment. In any event, with the possible and passing exception of Mr. Bledsoe's comment, quoted above, the debate was entirely focused on the meaning of the Confederate battle flag, not on the meaning of the SCV logo per se, nor on the views, merits, or values of the SCV itself.

Significantly, Commissioner Patterson, who was the first person to speak at the November hearing, started off his remarks not by describing the qualities of the SCV, but by quoting infamously ironic statements by Abraham Lincoln and Robert E. Lee, the former suggesting the Great Emancipator in fact harbored racist sentiments, and the latter tending to show General Lee opposed slavery and desired to see all slaves emancipated.[20]

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[20] Patterson attributed the following to Abraham Lincoln:

> "I will say then that I am not, nor have I ever been, in favor of bringing about in any way the social and political equality of the white and black races, that I am not now, nor have I ever been, in favor of making voters or jurors of Negroes, nor of qualifying them to hold office, not to intermarry with white people, and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two

Continued ...

While these quotes help illustrate the complexity of the causes of the Civil War, they also further confirm the problem with the specialty plate at issue here has nothing to do with the SCV itself or any viewpoint it holds, but with the meaning of the Confederate battle flag, which has, unfortunately, become inseparably connected with racial tensions.

Reviewing the record, there is no indication the DMVB denied SCV's application either because of the identity of the applicant, or because SCV espouses a positive viewpoint regarding the battle flag. Rather, the record demonstrates conclusively the decision was based on the content of the message. *See McDonald*, 280 F.3d at 170 ("It is apparent that Vermont's policy does not oppose Perry's philosophical views as reflected in the vanity plate. Vermont's policy prohibits Perry's vanity plate not be-

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races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be a position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race."

Nov. Trans. at 7–8. He quoted from Robert E. Lee thus:

> "In this enlightened age there are few, I believe, but what will acknowledge that slavery as an institution is immoral and political evil in any country. I think it, however, a greater evil to the white than to the black race. . . . The emancipation will sooner result from the mild and melting influence of Christianity than the storms and tempests of fiery controversy. While we see the course of final abolition of human slavery is onward and we give the aid of our prayers and all justifiable means in our power."

Id. at 8–9. Of course, posterity has judged both men approvingly, but on the basis of their deeds, rather than the above words.

cause it stands for 'Shit happens (so don't let life's problems drive you to drink),' but because Perry chose to express that viewpoint using a combination of letters that stands in part for the word 'shit.' This restriction does not discriminate on the basis of viewpoint.").

A hypothetical confirms that what is before the Court is a question of content, rather than viewpoint. Imagine a historical society, we might call it, the "Axis & Allies Society," dedicated to studying all aspects of the Second World War from a nationally neutral and objective point of view. Accordingly, as its logo, it chooses some design which incorporates the various national symbols used by all the major combatants: a white star for the United States, the British tri-colored roundel, the rising sun of imperial Japan, the hammer and sickle of the Soviet Union, and the swastika of the Third Reich. If the historical society sought a specialty license plate using its composite logo, the design would properly be rejected under the specialty plate rules, not due to the (entirely unobjectionable) viewpoint of the society, but due to the derogatory content of its logo, specifically the swastika.

The mere fact the content-based denial impacted the SCV, and would not affect applicant groups with a different viewpoint, is immaterial. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Knights of the Ku Klux Klan*, 58 F.3d at 1081 ("The fact that the State wishes to exclude only one group with a certain viewpoint does not alone make the exclusion viewpoint-based.").

The SCV repeatedly argues the fact the Buffalo Soldiers plate was approved indicates SCV was subjected to

viewpoint discrimination. SCV speculates Native Americans would be offended by the Buffalo Soldiers plate, because of the role played by African-American troops in the frontier wars of the nineteenth century. However, the record does not support this assertion: in contrast to the chorus of negative public comments raised against the SCV's plate, there appears to have been no significant objection to the Buffalo Soldiers plate, rendering SCV's assertion the Buffalo Soldiers plate is equally derogatory at best purely speculative. Indeed, the Buffalo Soldiers plate elicited only brief remarks at the November 2011 hearing: First, Commissioner Patterson spoke in favor of it, albeit mostly as a way of suggesting the SCV plate should also be adopted, by equating the service of Confederate servicemen with that of the Buffalo Soldiers.[21] Specifically, Patterson suggested anyone offended by either plate should "get a grip." *Id.* at 10 Second, Captain Paul J. Matthews, the founder of the Buffalo Soldiers National Museum in Houston, objected to such comparisons, asserting the Buffalo Soldiers were "peacekeepers" who fought to defend the American flag, whereas "the Confederacy fought to destroy [it]."[22] *Id.* at 75. Finally, when the

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[21] When Patterson was recognized to speak regarding the SCV plate, he also spoke in favor of the Buffalo Soldiers plate, even though it was technically a separate agenda item, to be considered after a vote on the SCV plate. Patterson was apparently losing his voice, and left the hearing before the DMVB turned to the Buffalo Soldiers plate. Captain Matthews, the principal behind the Buffalo Soldiers plate, voiced his objection to the comparison during the SCV discussion, and also spoke in favor of the Buffalo Soldiers plate when the floor was opened for comments on it.

[22] It bears noting this was one of the few negative remarks made about the Confederacy, as opposed to the battle flag as a symbol.

Buffalo Soldiers plate was actually before the DMVB, there were no speakers against it, and after brief remarks in favor by two speakers, it was approved.

More importantly, the content of the Buffalo Soldiers plate, unlike the SCV's design, is quite innocuous, consisting simply of the words "Buffalo Soldiers," a buffalo, and a crossed rifle and sabre. No inflammatory symbol comparable to the Confederate battle flag appears on the Buffalo Soldiers plate, nor is there any evidence those symbols are derogatory to any person. As such, the DMVB's approval of the Buffalo Soldiers plate is not evidence SCV was subjected to viewpoint discrimination. Rather, it confirms the DMVB was evenhandedly applying a permissible, content-based restriction on use of a nonpublic forum.

The Court thus finds rejection of the SCV's application was a content-based restriction on speech, rather than a viewpoint-based limitation. Because the restriction is one of content only, and because the specialty plates constitute a nonpublic forum, the Court concludes SCV's First Amendment rights were not *per se* violated by the DMVB's refusal to issue a specialty plate bearing the Confederate battle flag logo used by the SCV. *See Perry Educ. Ass'n*, 460 U.S. at 49 ("Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter . . ."). Having so concluded the only remaining issue is the reasonableness of the restriction.

D. Is the DMVB's Restriction Reasonable?

Content-based restrictions on speech in a nonpublic forum are reviewed under a reasonableness standard. *Perry Educ. Ass'n*, 460 U.S. at 46. "The reasonableness

of a government restriction of access to a nonpublic forum is assessed 'in the light of the purpose of the forum and all the surrounding circumstances.'" *Knights of the Ku Klux Klan*, 58 F.3d at 1079 (quoting *Cornelius*, 473 U.S. at 809).

"Automobile license plates are governmental property intended primarily to serve a governmental purpose, and inevitably they will be associated with the state that issues them." *McDonald*, 280 F.3d at 169. Consequently, the state of Texas has a legitimate, significant interest in excluding derogatory content from specialty plates. The DMVB was presented with ample evidence, which the Court has summarized above, of the racially derogatory message connoted by the Confederate battle flag. Several Courts of Appeals opinions have likewise recognized this unfortunate fact. *E.g.*, *Scott*, 324 F.3d at 1248–49. Accordingly, there is no doubt the DMVB was authorized by generally applicable rules and the statute to reject the SCV's application. Given the apparent purposes of the specialty plate program are variously to (1) regulate and identify motor vehicles, (2) generate revenue for the state, and (3) provide limited financial support for nonprofit groups, rather than to set up an open, First Amendment forum, the Court finds it was reasonable for the state to exclude derogatory content generally from the specialty plate program. It was also imminently reasonable for the DMVB to conclude the Confederate battle flag portion of the SCV's application was such derogatory content.[23]

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[23] However, the Court finds the alternative basis advanced by the DMVB, premised on a supposed threat to public safety, by which the controversial nature of the battle flag would "distract or disturb

Continued ...

This restriction is also reasonable in light of how little it otherwise burdens the SCV's First Amendment rights. The SCV's members are free to put their logo anywhere else on their vehicles, except for the state-issued license plates. *See McDonald*, 280 F.3d at 169 ("Moreover, Vermont's policy does not prevent Perry from communicating any particular message on her automobile. For instance, Perry may display a bumper sticker bearing the letters SHTHPNS if she so desires."). They are further free to put up signs with the SCV logo on their own property, or elsewhere with the owner's permission. They are likewise free to publish the logo wherever they may. They may even lobby the legislature to obtain a statutory plate.[24] As such, consistent with the Supreme Court's nonpublic forum precedent, other avenues of speech remain fully available to the SCV *See Perry Educ. Ass'n*, 460 U.S. at 53–54 ("The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access.") (citing *Greer*, 424 U.S. at 839; *Pell v. Procunier*, 417 U.S. 817, 827–28 (1974) (noting prison inmates may communicate with

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drivers to the point of being unreasonably dangerous" is not reasonable. There was scant evidence before the DMVB to support such a finding. In addition, vague, "public safety" standards are no standard at all in First Amendment analysis, and generally cannot support a restraint on speech. *See Lewis v. Wilson*, 253 F.3d 1077, 1080–81 (8th Cir. 2001).

[24] Although suggesting a petitioner for judicial relief should look to the legislative branch for assistance is usually the practical equivalent of there being no relief available, here the Texas legislature can and frequently has approved a variety of plates—including controversial plates, such as "Choose Life"—by direct legislative action.

media by mail and through visitors)). The Court thus concludes the ban on derogatory content, both facially and as applied, is reasonable, and does not offend the First Amendment.

E. Prior Decisions in Favor of the SCV are Unavailing

SCV relies heavily on the District Court of Massachusett's opinion in *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099 (D. Md. 1997). The Court has carefully reviewed this opinion, which is thoughtful and well written, but the Court finds it ultimately unpersuasive. There, confronting very similar facts, Judge Smalkin concluded:

> The SCV and SCV–MD indisputably view the flag in their logo as representing "honor and chivalry in battle during the War between the States." Presumably, the numerous, unnamed persons who complained to the [Motor Vehicle Administration (MVA)] view that same flag as a symbol of racial oppression and hostility. In light of these divergent views, when the MVA Administrator, in response to "numerous complaints," halted the issuance of SCV–MD organization plates bearing the Confederate battle flag logo and ordered the recall of all previously issued such plates, it is plain beyond dispute that he advanced the viewpoint of those offended by the flag and discouraged the viewpoint of those proud of it.

Id. at 1103–04 (citations omitted). The Maryland District court rested this conclusion on the Supreme Court's seminal holding in *R.A.V. v. City of St. Paul*,

505 U.S. 377 (1992). There, the Supreme Court struck down a ban on placing swastikas, burning crosses, or similarly offensive symbols on public or private property, when the actor in question knew or had reason to know doing so would arouse anger, alarm, or resentment in others due to race, color, creed, religion, or gender. *Id.* at 380.

> Displays containing abusive invective, no matter how vicious or severe, are permissible [under the ordinance] unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id. at 391. After quoting the foregoing, Judge Smalkin reasoned:

> Similarly, under the Defendants' guidelines, although the use of the Confederate battle flag logo to convey that the flag is a symbol of honor may be prohibited because it is a view that some may find offensive as racially hostile or degrading speech, the use of the flag (perhaps inside a red circle superimposed with an x) to denounce racism would presumably be permissible. The First Amendment does not countenance such viewpoint discrimination, even for the purpose of suppressing speech that may be perceived as racially degrading or hostile.

Glendening, 954 F. Supp. at 1104.

The Court respectfully disagrees. The ordinance at issue in *R.A.V.* was not viewpoint neutral; rather, it singled out some types of offensive speech, directed at particular groups, making that speech illegal, while allowing speech of an otherwise equally offensive content, if the viewpoint was directed at other, unprotected groups, such as "political affiliation, union membership, or homosexuality." *R.A.V.*, 505 U.S. at 391.

With all due respect to Judge Smalkin, nothing in *this* record suggests a Confederate flag inside "a red circle superimposed with an x" would be permitted under the specialty plate regulations, which precludes application of Judge Smalkin's conclusion the similar regulations in *Glendening* were not viewpoint neutral. Placing the Confederate battle flag inside a circle–x is obviously derogatory towards those Americans who fought for the Confederacy, and would therefore offend the many people today who honor their service. As such, a plate design featuring a crossed-out Confederate battle flag would be just as impermissible under the regulations as the SCV's attempt to positively display the battle flag. For this reason, the regulations at issue here are distinguishable from the ordinance in *R.A.V.*, which, by protecting some groups, but not others, singled out some viewpoints as being impermissible, while allowing other viewpoints. This is confirmed by a comparison of the text of the regulation in *R.A.V.*, which, as noted above described specific classes of persons who are protected, and specific types of conduct which was prohibited, with the regulation here, which prohibits any type of derogatory speech, no matter who it is directed towards. *Compare id.* at 380 ("'Whoever places on public or private property a symbol, object, appellation, characterization or

graffiti, including, but not limited to, a burning cross or Nazi swastika . . . on the basis of race, color, creed, religion or gender . . "), *with* former 43 TEX. ADMIN. CODE § 217.28(c)(3) (defining "derogatory" as "an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions").

There is a further, very important, difference which *Glendening* did not consider.[25] The ordinance in *R.A.V.* was sweeping, and extended to all property, public and private. Under the ordinance, a landowner could not set up a swastika, or burn a cross, even on his own property.[26] Here, all that is restricted are the small areas of space taken up by the two license plates which Texas law requires be installed on all vehicles in the state.

SCV also relies heavily on a Fourth Circuit decision, however, it is factually distinct from this case. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir.

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[25] The Court does not suggest this was an oversight on Judge Smalkin's part. Rather, having concluded the state's attempt to recall the Sons of Confederate Veterans' plates constituted impermissible viewpoint discrimination, the District Court of Maryland had no need to consider whether the Maryland plate program constituted a designated public forum, or a nonpublic forum, thus obviating any need to look at the other aspects of the ordinance in *R.A.V.* *See Glendening*, 954 F. Supp. at 1103 ("The Court need not decide whether the organization plate is a public or nonpublic forum, however, because the MVA's actions constitute impermissible viewpoint discrimination in either forum . . . .").

[26] The ordinance also required knowledge or reason to know the conduct in question would cause offense, but it would be a rare person indeed who would put up those symbols and yet be unaware of their meaning.

2002). There, the Fourth Circuit considered the following Virginia statute:

> On receipt of an application therefor and written evidence that the applicant is a member of the Sons of Confederate Veterans, the Commissioner shall issue special license plates to members of the Sons of Confederate Veterans. *No logo or emblem of any description shall be displayed* or incorporated into the design of license plates issued under this section.

VA. CODE § 46.2-746.22 (emphasis added).

The statute in question, and the related license plates, were all part of a special plate program by which the Virginia legislature authorized issuance of special plates to members and supporters of a variety of organizations. *Griffin*, 288 F.3d at 614. "In contrast to other Virginia statutes authorizing special plates for members or supporters of various organizations, this statute contains a restriction (the logo restriction) providing that '[n]o logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section.'" *Id.* at 613 (quoting VA. CODE § 46.2-746.22). The Court almost need go no further in discussing *Griffin*. The Fourth Circuit unsurprisingly found the SCV had been singled out based on its viewpoint, because it was forbidden from including any logo (when all other groups were permitted a logo), and therefore struck down the statute. Indeed, the Fourth Circuit, after careful review of the relevant statutes, found:

> The logo restriction is the only restriction of its kind contained in any of the numerous special-plate-authorizing statutes. A review of these numerous and varied statutes does not reveal

> any intent on the Commonwealth's part to limit, on the basis of content, the scope of speech within the special plate forum in any principled way.

Id. at 626.

In stark contrast, no statute or regulation is directed against the SCV in Texas. Rather, the DMVB cited the general prohibition on derogatory content, and safety concerns, in rejecting the SCV's application. There is no suggestion in the record the SCV's application would have been denied if its logo did not contain the Confederate battle flag; unlike in *Griffin*, the state has not singled out the SCV and forbidden it to use *any* logo on a specialty plate. As such, *Griffin* is distinguishable from this case. In further distinction, the Texas legislature, unlike that of Virginia, has crafted a generally applicable, principled limit on content: the ban on derogatory content authorized by section 504.801, and effected by former section 217.28(c)(3) of the Administrative Code. In sum, while *Griffin* reached a different result, the facts in *Griffin* stand in an illustrating contrast to the facts in this case, and thus the Court's findings here are not contrary to *Griffin*.

F. The Same Result Applies if the Specialty Plates are a Limited Forum

Alternatively, the Court finds even if the specialty plate program constitutes a limited public forum, the rule against derogatory content passes muster within the Fifth Circuit for the same reasons, because restrictions in both nonpublic forums, and limited forums, are permissible so long as the restrictions are reasonable, and not based on opposition to the speaker's viewpoint.

Chiu, 260 F.3d at 347. This is confirmed by a recent Supreme Court opinion regarding a limited forum.

The Supreme Court has reiterated that viewpoint-neutral restrictions on limited public forums are permissible, even when application of those restrictions falls more harshly upon some groups than others. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2978 (2010); *id.* at 2996 (Stevens, J., concurring) ("[I]t is a basic tenet of First Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination."). There, the Supreme Court considered a student-fee funded, "registered student organization" (RSO) program. *Id.* at 2979 (majority opinion). The program, which was open to any student organization, allowed the use of Hastings' facilities, and provided financial support to qualifying student organizations. *Id.* Inclusion within the program, however, was predicated on the RSO's commitment to be open to "all-comers," meaning no student could be excluded from membership, or from the opportunity to compete for leadership within an RSO, on the basis of, *inter alia*, religion or sexual orientation. *Id.* at 2980–81. The Christian Legal Society was thus denied RSO status because it required its members to affirm their status as Christians, and to reject homosexuality as sinful. *Id.* However, Hastings allowed the Christian Legal Society free use of Hastings facilities for meetings; what was denied was access to certain RSO-only notice boards, and funding from student fees. *Id.* at 2981. The Supreme Court found this was not viewpoint discrimination, but rather was permissible limitation to a limited public forum. *Id.* at 2993.

What is instructive here is the Supreme Court held enforcing the "all-comers" rule, which of course negatively impacted the Christian Legal Society, but was readily complied with by other student organizations, nevertheless did not constitute viewpoint discrimination. *Id.* at 2994. In the same vein, the specialty plate rule precluding derogatory content has negatively impacted the SCV, but not other organizations. Nevertheless, just as Hastings was properly able to limit access to its limited public forum to those organizations which were able to conform to the viewpoint-neutral "all-comers" requirement, the Court finds Texas may properly limit the specialty plate forum to the viewpoint-neutral requirement that specialty plates not be derogatory in content. *See id.* Much as the Christian Legal Society was seeking "not parity with other organizations, but a preferential exemption from" the challenged policy, so the SCV is seeking an exemption from the rule forbidding issuance of a specialty plate which contains derogatory content. *Id.* at 2978. As Justice Stevens succinctly put it in his concurrence, "Although the First Amendment may protect CLS's discriminatory practices off campus, it does not require a public university to validate or support them." *Id.* at 2996 (Stevens, J., concurring). Similarly, the First Amendment protects SCV's determination to honor the courage of Confederate troops, and likewise protects SCV's decision to adopt and display the Confederate battle flag as its symbol. However, the First Amendment does not require the state to endorse the battle flag by putting it on government-controlled property where the state does not want it.[27]

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[27] Of course, as any casual visitor to the Texas Capitol can attest, Continued ...

Conclusion

It is a sad fact the Confederate battle flag has been co-opted by odious groups as a symbol of racism and white supremacy. There is no reason to doubt the SCV and its members are entirely heartfelt in their condemnation of this misuse. It is to be hoped the passage of time, and efforts such as the SCV's resolution, will eventually remove a blight from the flag under which feats of great heroism and fortitude were accomplished. All the traditional avenues of public discourse are open to those who would fully redeem the battle flag. Nevertheless, the state of Texas has chosen to abstain from this debate, and the First Amendment does not require it to open up state-issued license plates as an additional forum in which to contest the flag's meaning.

Accordingly,

> IT IS ORDERED that Plaintiffs Texas Division, Sons of Confederate Veterans, Inc, et al.'s Motion for Summary Judgment [#35] is DENIED;

Texas is not averse to putting up public monuments which honor the service of Confederate troops. However, the legislature's decision there does not require it to put the Confederate battle flag anywhere a private citizen demands. Furthermore, the two large Confederate monuments on the Capitol grounds in fact illustrate why the state might be hesitant to endorse a plate consisting of little more than the battle flag. The monuments, one to Hood's Texas Brigade, the other to all armed forces of the Confederacy, feature statues of Confederate servicemen, and have detailed inscriptions memorializing their service. The battle flag is not a prominent feature on either monument. As such, there can be no mistake the state is endorsing the service of Confederate troops, not the latter-day, racist connotations of the battle flag.

IT IS FINALLY ORDERED that Defendants Victor T. Vandergriff et al.'s Motion for Summary Judgment [#37] is GRANTED.

SIGNED this the 12th day of April 2013.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.; GRANVEL J. BLOCK; and RAY W. JAMES,
Plaintiffs,

-vs-

Case No. A-11-CA-1049-SS

VICTOR T. VANDERGRIFF in his official capacity as Chairman of the Motor Vehicles Board; CLIFFORD BUTLER in his official capacity as a member of the Board; RAYMOND PALACIOS, JR., in his official capacity as a member of the Board; BLAKE INGRAM in his official capacity as a member of the Board; LAURA RYAN in her official capacity as a member of the Board; VICTOR RODRIGUEZ in his official capacity as a member of the Board; MARVIN RUSH in his official capacity as a member of the Board; and

JOHN WALKER, III, in his official capacity as a member of the Board,

Defendants.

AMENDED JUDGMENT

BE IT REMEMBERED on this day the Court is advised its original judgment in this matter did not accurately reflect the Defendants to this lawsuit, as named in the Amended Complaint, and the Court therefore issues this amended judgment, correcting the style.

IT IS ORDERED, ADJUDGED, and DECREED that the Plaintiffs Texas Division, Sons of Confederate Veterans, Inc., Granvel J. Block, and Ray W. James TAKE NOTHING in this cause against the Defendants, the parties to bear their own costs.

SIGNED this the /s/ 1st day of May 2013.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

Sec. 504.008. SPECIALTY LICENSE PLATES. (a) The department shall prepare the designs and specifications of specialty license plates.

(b) Any motor vehicle other than a vehicle manufactured for off-highway use only is eligible to be issued specialty license plates, provided that the department may vary the design of a license plate to accommodate or reflect its use on a motor vehicle other than a passenger car or light truck.

(c) An application for specialty license plates must be submitted in the manner specified by the department, provided that if issuance of a specialty license plate is limited to particular persons or motor vehicles, the application must be accompanied by evidence satisfactory to the department that the applicant or the applicant's vehicle is eligible.

(d) Each fee described by this chapter is an annual fee, provided that the department may prorate the fee for a specialty license plate fee on a monthly basis to align the license plate fee to the registration month for the motor vehicle for which the license plate was issued, and if a fee is prorated the allocation of the fee by this chapter to an account or fund shall be prorated in proportion.

(e) The director or the director's designee may refuse to issue a specialty license plate with a design or alphanumeric pattern that the director or designee considers potentially objectionable to one or more members of the public and the director or designee's refusal may not be overturned in the absence of an abuse of discretion.

(f) For each specialty license plate that is issued by a county assessor- collector and for which the de-

partment is allocated a portion of the fee for administrative costs, the department shall credit 50 cents from its administrative costs to the county treasurer of the applicable county, who shall credit the money to the general fund of the county to defray the costs to the county of administering this chapter.

(g) If the owner of a motor vehicle for which a specialty license plate is issued disposes of the vehicle or for any reason ceases to be eligible for that specialty license plate, the owner shall return the specialty license plate to the department.

(h) A person who is issued a specialty license plate may not transfer the plate to another person or vehicle unless the department approves the transfer.

Added by Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 173, eff. January 1, 2012.

SUBCHAPTER G. SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION

Sec. 504.601. GENERAL PROVISIONS APPLICABLE TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION. (a) Unless expressly provided by this subchapter or department rule:

(1) the fee for issuance of a license plate under this subchapter is $30; and

(2) of each fee received under this subchapter, the department shall use $8 to defray its administrative costs in complying with this subchapter.

(b) This section does not apply to a specialty license plate marketed and sold by a private vendor at the request of the specialty license plate sponsor under Section 504.6011.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 4, eff. September 1, 2009.

Sec. 504.6011. GENERAL PROVISIONS APPLICABLE TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION SOLD THROUGH PRIVATE VENDOR. (a) The sponsor of a specialty license plate may contract with the private vendor authorized under Subchapter J for the marketing and sale of the specialty license plate.

(b) The fee for issuance of a specialty license plate described by Subsection (a) is the amount established under Section 504.851.

(c) Notwithstanding any other law, from each fee received for the issuance of a specialty license plate described by Subsection (a), the department shall:

(1) deduct the administrative costs described by Section 504.601(a)(2);

(2) deposit to the credit of the account designated by the law authorizing the specialty license plate the portion of the fee for the sale of the plate that the state would ordinarily receive under the contract described by Section 504.851(a); and

(3) pay to the private vendor the remainder of the fee.

(d) A sponsor of a specialty license plate authorized to be issued under this subchapter before November 19, 2009, may reestablish its specialty license plate under Sections 504.601 and 504.702 and be credited its previous deposit with the department if a contract entered into by the sponsor under Subsection (a) terminates.

Added by Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 5, eff. September 1, 2009.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 203, eff. January 1, 2012.

. . . .

Sec. 504.602. KEEP TEXAS BEAUTIFUL LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Keep Texas Beautiful." The department shall design the license plates in consultation with Keep Texas Beautiful, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be used in connection with the department's litter prevention and community beautification programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.603. TEXAS CAPITOL LICENSE PLATES. (a) The department shall design and issue specialty license plates relating to the State Capitol. The department may design the license plates in consultation with the State Preservation Board.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Capitol fund established under Section 443.0101, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1251 (S.B. 1914), Sec. 2, eff. September 1, 2013.

Sec. 504.604. TEXAS COMMISSION ON THE ARTS LICENSE PLATES. (a) The department shall issue specialty license plates including the words "State of the Arts." The department shall design the license plates in consultation with the Texas Commission on the Arts.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Commission on the Arts operating fund established under Section 444.027, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.605. ANIMAL FRIENDLY LICENSE PLATES. (a) The department shall issue specialty li-

cense plates including the words "Animal Friendly." The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the animal friendly account established by Section 828.014, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.606. BIG BEND NATIONAL PARK LICENSE PLATES. (a) The department shall issue specialty license plates that include one or more graphic images of a significant feature of Big Bend National Park. The department shall design the license plates in consultation with the Parks and Wildlife Department and any organization designated by it.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Big Bend National Park account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization whose primary purpose is the improvement or preservation of Big Bend National Park.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.607. READ TO SUCCEED. (a) The department shall issue specialty license plates including the words "Read to Succeed." The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited

to the credit of the "Read to Succeed" account in the general revenue fund. Money in the account may be used only to provide educational materials for public school libraries. The account is composed of:

(1) money required to be deposited to the credit of the account under this subsection; and

(2) donations made to the account.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.608. MOTHERS AGAINST DRUNK DRIVING LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Mothers Against Drunk Driving." The department shall design the license plates in consultation with Mothers Against Drunk Driving.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be appropriated only to the Texas Higher Education Coordinating Board in making grants to benefit drug-abuse prevention and education programs sponsored by Mothers Against Drunk Driving.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 575 (H.B. 1480), Sec. 2, eff. September 1, 2005.

Sec. 504.609. UNITED STATES OLYMPIC COMMITTEE LICENSE PLATES. The department shall issue specialty license plates including the words "United States Olympic Committee." The department shall design the license plates in consultation with the United States Olympic Committee.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.610. TEXAS AEROSPACE COMMISSION LICENSE PLATES. (a) The department may issue specialty license plates in recognition of the Texas Aerospace Commission. The department shall design the license plates in consultation with the Texas Aerospace Commission.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 79, eff. September 1, 2013.

Sec. 504.611. VOLUNTEER ADVOCATE PROGRAM LICENSE PLATES. (a) The department shall issue specialty license plates in recognition of children. The department shall design the license plates in consultation with the attorney general.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the attorney general volunteer advocate program account in the general revenue fund. Money deposited to the credit of the volunteer advocate program account may be used only by the attorney general to fund a contract entered into by the attorney general under Section 264.602, Family Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.612. TEXAS YOUNG LAWYERS ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates including the words "And Justice for All." The department shall design the license plates in consultation with the Texas Young Lawyers Association.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the basic civil legal services account established by Section 51.943, Government Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.613. HOUSTON LIVESTOCK SHOW AND RODEO LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Houston Livestock Show and Rodeo." The department shall design the license plates in consultation with the Houston Livestock Show and Rodeo.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Houston Livestock Show and Rodeo scholarship account in the state treasury. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to benefit the Houston Livestock Show and Rodeo.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.614. PROFESSIONAL SPORTS TEAM LICENSE PLATES. (a) The department may issue specialty license plates that include the name and insignia of a professional sports team located in this state.

The department shall design the license plates in consultation with the professional sports team and may enter a trademark license with the professional sports team or its league to implement this section. A license plate may be issued under this section only for a professional sports team that:

(1) certifies to the department that the requirements of Section 504.702 are met; and

(2) plays its home games in a facility constructed or operated, in whole or in part, with public funds.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be sent to the public entity that provided public funds for the construction or renovation of the facility in which the professional sports team plays its home games or that provides public funds for the operation of that facility. The funds shall be deposited to the credit of the venue project fund, if the public entity has created a venue project fund under Section 334.042 or 335.072, Local Government Code. If the public entity has not created a venue project fund, funds distributed to a public entity under this section must first be used to retire any public debt incurred by the public entity in the construction or acquisition of the facility in which the professional sports team plays its home games. After that debt is retired, funds distributed to the public entity may be spent only for maintenance or improvement of the facility.

(b-1) A public entity that receives money under Subsection (b) may contract with the private vendor under Section 504.6011 to distribute the entity's portion of

the money in a manner other than that described by Subsection (b).

(c) In this section:

(1) "Public entity" includes a municipality, county, industrial development corporation, or special district that is authorized to plan, acquire, establish, develop, construct, or renovate a facility in which a professional sports team plays its home games.

(2) "Professional sports team" means a sports team that is a member or an affiliate of a member of the National Football League, National Basketball Association, or National Hockey League or a major league baseball team.

Added by Acts 203, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 204, eff. January 1, 2012.

Sec. 504.615. COLLEGIATE LICENSE PLATES. (a) The department shall issue specialty license plates that include the name and insignia of a college. The department shall design the license plates in consultation with the applicable college. The department may issue a license plate under this section only for a college that certifies to the department that the requirements of Section 504.702 are met.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund. The money may be used only for:

(1) scholarships to students who demonstrate a need for financial assistance under Texas Higher Education Coordinating Board rule; or

(2) Texas Public Educational Grants awarded under Subchapter C, Chapter 56, Education Code, if the fee is for the issuance of a license plate for a college described by Subsection (e)(1).

(c) If the fee is for the issuance of license plates for a college described by Subsection (e)(1), the money:

(1) shall be deposited to the credit of the institution of higher education designated on the license plates; and

(2) is supplementary and is not income for purposes of reducing general revenue appropriations to that institution of higher education.

(d) If the fee is for the issuance of license plates for a college described by Subsection (e)(2), the money shall be deposited to the credit of the Texas Higher Education Coordinating Board. The money:

(1) shall be allocated to students at the college designated on the plates; and

(2) is in addition to other money that the board may allocate to that college.

(d-1) If the fee is for the issuance of license plates for a college described by Subsection (e)(3), the money:

(1) shall be deposited to the credit of the Texas Higher Education Coordinating Board; and

(2) is supplementary and is not income for purposes of reducing general revenue appropriations to that board.

(e) In this section, "college" means:

(1) an institution of higher education as defined by Section 61.003, Education Code;

(2) a private college or university described by Section 61.222, Education Code; or

(3) a college or university that is not located in this state.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 1181 (S.B. 1227), Sec. 53, eff. September 1, 2005.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 205, eff. January 1, 2012.

Sec. 504.616. TEXAS READS LICENSE PLATES. (a) The department shall issue specialty license plates including the words "Texas Reads" that incorporate one or more submissions from middle school students in a competition conducted by the department.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Texas Reads account in the general revenue fund. Money from the account may be used only to make grants under Section 441.0092, Government Code. The account is composed of:

(1) money required to be deposited to the credit of the account under this subsection; and

(2) donations made to the account.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 206, eff. January 1, 2012.

Sec. 504.617. TEXAS. IT'S LIKE A WHOLE OTHER COUNTRY LICENSE PLATES. (a) The department shall issue specialty license plates that include the trademarked Texas patch and the words "Texas. It's Like A Whole Other Country." The department shall de-

sign the license plates in consultation with the Texas Department of Economic Development.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the tourism account in the general revenue fund to finance the Texas Department of Economic Development's tourism activities.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.618. CONSERVATION LICENSE PLATES. (a) The department shall issue specialty license plates to support Parks and Wildlife Department activities. The department shall design the license plates in consultation with the Parks and Wildlife Department.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas parks and wildlife conservation and capital account established by Section 11.043, Parks and Wildlife Code. Money deposited in the Texas parks and wildlife conservation and capital account under this section is supplementary and is not income for the purposes of reducing general revenue appropriations to the Parks and Wildlife Department.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.619. TEXAS COMMISSION FOR THE DEAF AND HARD OF HEARING LICENSE PLATES. (a) The department shall issue specialty license plates in support of the Texas Commission for the Deaf and Hard of Hearing. The department shall design

the license plates in consultation with the Texas Commission for the Deaf and Hard of Hearing.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates:

(1) shall be deposited to the credit of the general revenue fund; and

(2) may be appropriated only to the Texas Commission for the Deaf and Hard of Hearing for direct services programs, training, and education.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.620. TEXANS CONQUER CANCER LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Texans Conquer Cancer." The department shall design the license plates in consultation with the Cancer Prevention and Research Institute of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the cancer prevention and research fund established by Section 102.201, Health and Safety Code.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 266 (H.B. 14), Sec. 6, eff. November 6, 2007.

Sec. 504.6201. CANCER OF UNKNOWN PRIMARY ORIGIN AWARENESS LICENSE PLATES.

(a) The department shall issue specialty license plates to raise awareness of cancer of unknown primary origin. The license plates must include the words "A Fine Cause for Unknown Cancer." The department shall de-

sign the license plates in consultation with the Orange Grove Family Career and Community Leaders of America.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the cancer prevention and research fund established by Section 102.201, Health and Safety Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 1005 (H.B. 4064), Sec. 1, eff. September 1, 2009.

Sec. 504.621. SPECIAL OLYMPICS TEXAS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Special Olympics Texas." The department shall design the license plates in consultation with Special Olympics Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Special Olympics Texas account established by Section 533.018, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.622. GIRL SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Girl Scouts." The department shall design the license plates in consultation with the Girl Scout Councils of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Girl Scout account in the state treasury. Money in the account may be used by the Texas Higher Education Co-

ordinating Board in making grants to benefit educational projects sponsored by the Girl Scout Councils of Texas.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.623. TEXAS YMCA. (a) The department shall issue specialty license plates in honor of the Young Men's Christian Association. The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the YMCA account established by Section 7.025, Education Code, as added by Chapter 869, Acts of the 77th Legislature, Regular Session, 2001.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.625. TEXAS AGRICULTURAL PRODUCTS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Go Texan" and the "Go Texan" logo of the Department of Agriculture. The department shall design the license plates in consultation with the commissioner of agriculture.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the proceeds to the credit of the "Go Texan" partner program account established by Section 46.008, Agriculture Code.
Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.626. TEXAS CITRUS INDUSTRY. (a) The department shall issue specialty license plates in honor

of the citrus industry in this state. The department shall design the license plates.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the general revenue fund that may be appropriated only to Texas A&M University-Kingsville to provide financial assistance to graduate students in the College of Agriculture and Human Sciences.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.627. WATERFOWL AND WETLAND CONSERVATION LICENSE PLATES. (a) The department shall issue specialty license plates including one or more graphic images supplied by the Parks and Wildlife Department. The department shall design the license plates in consultation with the Parks and Wildlife Department and any organization designated by it.

(b) After deducting the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization whose primary purpose is the conservation of waterfowl and wetland.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.6275. SAVE OUR BEACHES LICENSE PLATES. (a) The department shall issue specialty license plates to support the coastal protection and improvement program.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the coastal protection and improvement fund established by Section 33.653, Natural Resources Code, to fund the cleaning, maintaining, nourishing, and protecting of state beaches.

Added by Acts 2009, 81st Leg., R.S., Ch. 625 (H.B. 1286), Sec. 1, eff. September 1, 2009.

Sec. 504.628. UNITED WE STAND LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "United We Stand" and include only the colors red, white, blue, and black.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas mobility fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.630. AIR FORCE ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Air Force Association." The department shall design the license plates in consultation with the Air Force Association of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Air Force Association of Texas account in the state treasury. Money in the account may be used by the Texas Veterans Commission in making grants to benefit projects sponsored by the Air Force Association of Texas.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.631. TEXAS STATE RIFLE ASSOCIATION LICENSE PLATES. (a) The department shall issue specialty license plates to honor the Texas State Rifle Association.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of an account in the general revenue fund that may be appropriated only to the Texas Cooperative Extension of The Texas A&M University System as follows:

(1) 50 percent to supplement existing and future scholarship programs supported by the Texas State Rifle Association; and

(2) 50 percent to support the 4-H Shooting Sports Program for youth.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 311 (H.B. 2045), Sec. 1, eff. September 1, 2007.

Sec. 504.632. URBAN FORESTRY LICENSE PLATES. (a) The department shall issue specialty license plates to benefit urban forestry. The department shall design the license plates in consultation with an organization described in Subsection (b).

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the urban forestry account in the state treasury. Money in the account may be used by the Texas Forest Service in making grants to support the activities of a nonprofit organization located in Texas whose

primary purpose is to sponsor projects involving urban and community:

(1) tree planting;

(2) tree preservation; and

(3) tree education programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.633. SHARE THE ROAD LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Share the Road" and the image of a bicycle or a bicycle with a rider. The department shall design the plates in consultation with the Texas Bicycle Coalition Education Fund.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the share the road account in the state treasury to be used only by the Texas Education Agency to support the activities of a designated nonprofit organization whose primary purpose is to promote bicyclist safety, education, and access through:

(1) education and awareness programs; and

(2) training, workshops, educational materials, and media events.

(c) Up to 25 percent of the amount in Subsection (b) may be used to support the activities of the nonprofit organization in marketing and promoting the share the road concept and license plates.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.635. EL PASO MISSION VALLEY LICENSE PLATES. (a) The department shall issue El Paso Mission Valley specialty license plates. The de-

partment shall design the license plates in consultation with the Socorro Mission Restoration Effort.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the El Paso Mission Restoration account in the state treasury. Money in the account may be used only by the Texas Historical Commission in making grants to be used for the purpose of the preservation and rehabilitation of the Socorro, San Elizario, and Ysleta Missions.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 301 (H.B. 1347), Sec. 1, eff. September 1, 2013.

Sec. 504.636. COTTON BOLL LICENSE PLATES. (a) The department shall issue specialty license plates depicting a graphic image of a cotton boll. The department shall design the license plates in consultation with Texas Cotton Producers, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the general revenue fund for use only by the Texas Higher Education Coordinating Board in making grants to benefit Texas Cotton Producers, Inc., for the sole purpose of providing scholarships to students who are pursuing a degree in an agricultural field related to the cotton industry while enrolled in an institution of higher education, as defined by Section 61.003, Education Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.637. DAUGHTERS OF THE REPUBLIC OF TEXAS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Native Texan." The department shall design the license plates in consultation with the Daughters of the Republic of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the Daughters of the Republic of Texas account in the state treasury. Money in the account may be used only by the Texas Department of Economic Development or its successor agency in making grants to the Daughters of the Republic of Texas to be used only for the purpose of:

(1) preserving Texas historic sites; or

(2) funding educational programs that teach Texas history.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.638. KNIGHTS OF COLUMBUS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Knights of Columbus" and the emblem of the Order of the Knights of Columbus. The department shall design the license plates in consultation with the Knights of Columbus.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the State Council Charities account in the general revenue fund. Money in the account may be used only by the Texas Education Agency to make grants to State Council Charities to carry out the purposes of that organization.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.639. TEXAS MUSIC LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Texas Music." The department shall design the license plates in consultation with the governor's office.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Music Foundation account established by Section 7.027, Education Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.640. SPACE SHUTTLE COLUMBIA LICENSE PLATES. (a) The department shall issue Space Shuttle Columbia specialty license plates. The department shall design the license plates in consultation with the Aviation and Space Foundation of Texas.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be used only by the Texas Aerospace Commission or its successor agency in making grants to benefit the Aviation and Space Foundation of Texas for the purposes of furthering aviation and space activities in Texas and providing Columbia Crew memorial scholarships to students.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.641. BE A BLOOD DONOR LICENSE PLATES. (a) The department shall issue Be a Blood

Donor specialty license plates. The department shall design the license plates in consultation with the Gulf Coast Regional Blood Center in Houston.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the be a blood donor account under Section 162.016, Health and Safety Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.642. TEXAS COUNCIL OF CHILD WELFARE BOARDS LICENSE PLATES. (a) The department shall issue Texas Council of Child Welfare Boards specialty license plates. The department shall design the license plates in consultation with the Texas Council of Child Welfare Boards, Inc.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of a special account for abused and neglected children established at the Department of Protective and Regulatory Services. Money in the account may be used only by the Department of Protective and Regulatory Services to fund programs and services supporting abused and neglected children under Section 264.004, Family Code.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 207, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 208, eff. January 1, 2012.

Sec. 504.644. MARINE MAMMAL RECOVERY LICENSE PLATES. (a) The department shall issue Marine Mammal Recovery specialty license plates. The department shall design the license plates in consultation with the Parks and Wildlife Department and the Texas Marine Mammal Stranding Network.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of the Texas Marine Mammal Stranding Network in the recovery, rehabilitation, and release of stranded marine mammals. The Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent for purposes for which it is dedicated.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.645. 4-H LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "To Make the Best Better," the words "Texas 4-H," and the 4-H symbol of the four-leaf clover. The department shall design the license plates in consultation with the Texas 4-H and Youth Development Program.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and shall be used only by the Texas Cooperative Extension of the Texas A&M University System for 4-H and Youth Development Programs and to support the Texas Cooperative Extension's activities related to 4-H and Youth Development Programs.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.646. SMILE TEXAS STYLE LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Smile Texas Style." The department shall design the license plates in consultation with the Texas Dental Association.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund to be used only by the Texas Department of Health in making grants to benefit the Texas Dental Association Financial Services for the sole use of providing charitable dental care.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.647. FIGHT TERRORISM LICENSE PLATES. (a) The department shall issue Fight Terrorism specialty license plates that include a pentagon-shaped border surrounding:

(1) the date "9-11-01" with the likeness of the World Trade Center towers forming the "11";

(2) the likeness of the United States flag; and

(3) the words "Fight Terrorism."

(b) The fee shall be deposited to the credit of the Texas Department of Motor Vehicles fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 209, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 38, eff. September 1, 2013.

Sec. 504.648. GOD BLESS TEXAS AND GOD BLESS AMERICA LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "God Bless Texas" and "God Bless America."

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the share the road account in the state treasury and may only be used by the Texas Education Agency to support the Safe Routes to School Program of a designated statewide nonprofit organization whose primary purpose is to promote bicyclist safety, education, and access through:

(1) education and awareness programs; and

(2) training, workshops, educational materials, and media events.

(c) The fee for the license plates is $40.

(d) Up to 25 percent of the amount in Subsection (b) may be used to support the activities of the nonprofit organization in marketing and promoting the Safe Routes to School Program and the God Bless Texas and God Bless America license plates.

(e) The Texas Education Agency may use money received under this section to secure funds available under federal matching programs for safe routes to school and obesity prevention.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 201 (S.B. 161), Sec. 1, eff. May 27, 2009.

Sec. 504.651. MARCH OF DIMES LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "March of Dimes."

The department shall design the license plates in consultation with the March of Dimes Texas Chapter.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Texas Department of Health for use in the Birth Defects Registry.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.652. MASTER GARDENER LICENSE PLATES. (a) The department shall issue specialty license plates that include the seal of the Texas Master Gardener program of Texas Cooperative Extension.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of an account in the general revenue fund. Money in the account may be used only by Texas A&M AgriLife Extension for graduate student assistantships within the Texas Master Gardener program and to support Texas A&M AgriLife Extension's activities related to the Texas Master Gardener program.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 80, eff. September 1, 2013.

Sec. 504.654. EAGLE SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that bear a depiction of the Eagle Scout medal.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Ea-

gle Scout account in the general revenue fund. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to support projects sponsored by Boy Scout councils in this state. The Texas Higher Education Coordinating Board shall distribute grants under this section geographically as nearly as possible in proportion to the number of license plates issued under this section in each region of the state.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.6545. BOY SCOUT LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Boy Scouts of America." The department shall design the license plates in consultation with the Boy Scouts of America.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the Boy Scout account in the general revenue fund. Money in the account may be used only by the Texas Higher Education Coordinating Board in making grants to benefit educational projects sponsored by Boy Scout councils in this state.

Added by Acts 2005, 79th Leg., Ch. 575 (H.B. 1480), Sec. 3, eff. September 1, 2005.

Sec. 504.656. TEXAS LIONS CAMP LICENSE PLATES. (a) The department shall issue Texas Lions Camp specialty license plates. The department shall design the license plates in consultation with the Texas Lions League for Crippled Children.

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the

license plates shall be deposited to the credit of the Texas Lions Camp account in the state treasury. Money in the account may be used only by the Parks and Wildlife Department to support the activities of a designated nonprofit organization that is accredited by the American Camping Association and is licensed by the Texas Department of Health and whose primary purpose is to provide, without charge, a camp for physically disabled, hearing or vision impaired, and diabetic children who reside in this state, regardless of race, religion, or national origin. The Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent only for the purposes for which it is dedicated.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Sec. 504.657. HIGHER EDUCATION COORDINATING BOARD LICENSE PLATES. (a) The department shall issue specialty license plates for the Texas Higher Education Coordinating Board. The department shall design the license plates in consultation with the coordinating board.

(b) After deduction of the department's administrative costs, the remainder of the fee shall be deposited to the credit of the "College For Texans" campaign account in the general revenue fund for use only by the Texas Higher Education Coordinating Board for purposes of the campaign.

Added by Acts 2005, 79th Leg., Ch. 1181 (S.B. 1227), Sec. 54, eff. September 1, 2005.

Sec. 504.658. INSURE TEXAS KIDS LICENSE PLATES. (a) The department shall issue specialty license plates that include the words "Insure Texas Kids."

(b) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the general revenue fund and may be appropriated only to the Health and Human Services Commission to fund outreach efforts for public and private health benefit plans available for children.

Added by Acts 2007, 80th Leg., R.S., Ch. 1313 (S.B. 1032), Sec. 1, eff. September 1, 2007.

Sec. 504.659. MEMBERS OF AMERICAN LEGION. (a) The department shall issue specialty license plates for members of the American Legion. The license plates shall include the words "Still Serving America" and the emblem of the American Legion. The department shall design the license plates in consultation with the American Legion.

(b) The fee for the license plates is $30.

(c) After deduction of $8 to reimburse the department for its administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the American Legion, Department of Texas account in the state treasury. Money in the account may be used only by the Texas Veterans Commission in making grants to the American Legion Endowment Fund for scholarships and youth programs sponsored by the American Legion, Department of Texas.

Transferred and redesignated from Transportation Code, Section 504.413 by Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 210, eff. January 1, 2012.

Sec. 504.660. SEXUAL ASSAULT AWARENESS LICENSE PLATES. (a) The department shall design and issue specialty license plates to support victims of sexual assault.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1135, Sec. 140(3), eff. September 1, 2013.

(c) After deduction of the department's administrative costs, the remainder of the fee for issuance of the license plates shall be deposited to the credit of the sexual assault program fund established by Section 420.008, Government Code.

Added by Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 6, eff. September 1, 2009.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 140(3), eff. September 1, 2013.

Sec. 504.661. MARINE CONSERVATION LICENSE PLATES. (a) After deduction of the department's administrative costs in accordance with Section 504.801, the remainder of the fees allocated under Section 504.801(e)(2)(A) from the sale of Marine Conservation plates shall be deposited to the credit of an account in the state treasury to be used by the Texas Parks and Wildlife Department to support the activities of Coastal Conservation Association Texas in the conservation of marine resources.

(b) The Texas Parks and Wildlife Department shall establish reporting and other mechanisms necessary to ensure that the money is spent for the purpose for which it is dedicated.

Added by Acts 2009, 81st Leg., R.S., Ch. 397 (H.B. 1749), Sec. 1, eff. September 1, 2009.

Redesignated from Transportation Code, Section 504.660 by Acts 2013, 83rd Leg., R.S., Ch. 161 (S.B. 1093), Sec. 22.001(53), eff. September 1, 2013.

Sec. 504.662. CHOOSE LIFE LICENSE PLATES. (a) The department shall issue specially designed license

plates that include the words "Choose Life." The department shall design the license plates in consultation with the attorney general.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the fee for issuance of license plates under this section in the state treasury to the credit of the Choose Life account established by Section 402.036, Government Code.

Added by Acts 2011, 82nd Leg., R.S., Ch. 63 (S.B. 257), Sec. 1, eff. September 1, 2011.

Text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1102 (H.B. 3677), Sec. 1

For text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 81, see other Sec. 504.663.

Sec. 504.663. FOUNDATION SCHOOL PROGRAM LICENSE PLATES. (a) The department shall issue specially designed license plates to benefit the Foundation School Program. The department shall design the license plates in consultation with the Texas Education Agency.

(b) After deduction of the department's administrative costs, the department shall deposit the remainder of the fee for issuance of license plates under this section to the credit of the foundation school fund.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1102 (H.B. 3677), Sec. 1, eff. September 1, 2013.

Text of section as added by Acts 2013, 83rd Leg., R.S., Ch. 1135 (H.B. 2741), Sec. 81

SUBCHAPTER H. ADMINISTRATIVE PROVISIONS RELATING TO SPECIALTY LICENSE PLATES FOR GENERAL DISTRIBUTION

Sec. 504.702. SPECIALTY LICENSE PLATES AUTHORIZED AFTER JANUARY 1, 1999. (a) This section applies only to specialty license plates that are authorized to be issued by a law that takes effect on or after January 1, 1999.

(b) The department may manufacture the specialty license plates only if a request for manufacture of the license plates is filed with the department. The request must be:

(1) made in a manner prescribed by the department;

(2) filed before the fifth anniversary of the effective date of the law that authorizes the issuance of the specialty license plates; and

(3) accompanied by a deposit of $8,000.

(c) Repealed by Acts 2011, 82nd Leg., R.S., Ch. 1296, Sec. 247(21), eff. January 1, 2012.

(d) If a request is not filed with the department before the date specified by Subsection (b)(2), the law that authorizes the issuance of the specialty license plates expires on that date.

(e) The department may issue license plates under:

(1) Section 504.614 for a particular professional sports team only if $8,000 has been deposited with the department for that sports team; or

(2) Section 504.615 for a particular institution of higher education or private college or university only

if $8,000 has been deposited with the department for that institution, college, or university.

(f) Money deposited with the department under Subsection (b)(3) or (e) shall be returned by the department to the person who made the deposit after 800 sets of plates have been issued.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 729 (H.B. 2627), Sec. 2, eff. September 1, 2007.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 211, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 247(21), eff. January 1, 2012.

SUBCHAPTER I. DEVELOPMENT OF NEW SPECIALTY LICENSE PLATES

Sec. 504.801. CREATION OF NEW SPECIALTY LICENSE PLATES BY THE DEPARTMENT.

(a) The department may create new specialty license plates on its own initiative or on receipt of an application from a potential sponsor. A new specialty license plate created under this section must comply with each requirement of Section 504.702 unless the license is created by the department on its own initiative. The department may permit a specialty license plate created under this section to be personalized. The redesign of an existing specialty license plate at the request of a sponsor shall be treated like the issuance of a new specialty license plate.

(b) Any nonprofit entity may submit an application to the department to sponsor a new specialty license plate. An application may nominate a state agency to receive funds derived from the issuance of the license plates. The application may also identify uses to which those funds should be appropriated.

(c) The department shall design each new specialty license plate in consultation with the sponsor, if any, that applied for creation of that specialty license plate. The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule. At the request of the sponsor, distribution of the license plate may be limited by the department.

(d) The fee for issuance of license plates created under this subchapter before November 19, 2009, is $30 unless the department sets a higher fee. This subsection does not apply to a specialty license plate marketed and sold by a private vendor at the request of the specialty license plate sponsor.

(d-1) The fee for issuance of license plates created under this subchapter on or after November 19, 2009, is the amount established under Section 504.851.

(e) For each fee collected for a license plate issued by the department under this section:

(1) $8 shall be used to reimburse the department for its administrative costs; and

(2) the remainder shall be deposited to the credit of:

(A) the specialty license plate fund, which is an account in the general revenue fund, if the sponsor nominated a state agency to receive the funds; or

(B) the Texas Department of Motor Vehicles fund if the sponsor did not nominate a state agency to receive the funds or if there is no sponsor.

(f) Subchapter D, Chapter 316, Government Code, and Section 403.095, Government Code, do not apply to fees collected under this subchapter.

(g) The department may report to the legislature at any time concerning implementation of this section. The report may include recommendations concerning the appropriations, by amount, state agency, and uses, that are necessary to implement the requests of sponsors.

(h) The department may vary the design of a license plate created under this section to accommodate or reflect its use on a motor vehicle other than a passenger

car or light truck.

(i) The sponsor of a new specialty plate may not be for-profit enterprise.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2009, 81st Leg., R.S., Ch. 1136 (H.B. 2553), Sec. 38, eff. September 1, 2011.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 7, eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 212, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 39, eff. September 1, 2013.

SUBCHAPTER J. MARKETING OF SPECIALTY PLATES THROUGH PRIVATE VENDOR

Sec. 504.851. CONTRACT WITH PRIVATE VENDOR.

Text of subsection effective until September 01, 2014

(a) The department shall enter into a contract with the private vendor whose proposal is most advantageous to the state, as determined from competitive sealed proposals that satisfy the requirements of this section, for the marketing and sale of:

(1) personalized license plates; or

(2) with the agreement of the private vendor, other specialty license plates authorized by Subchapters G and I.

Text of subsection effective on September 01, 2014

(a) The department may enter into a contract with the private vendor whose proposal is most advantageous to the state, as determined from competitive sealed proposals that satisfy the requirements of this section, for the marketing and sale of:

(1) personalized license plates; or

(2) with the agreement of the private vendor, other specialty license plates authorized by Subchapters G and I.

(a-1) The department may not issue specialty, personalized, or souvenir license plates with background colors other than white, unless the plates are marketed and sold by the private vendor.

(a-2) Specialty license plates authorized for marketing and sale under Subsection (a) may be personalized and must include:

(1) specialty license plates created under Subchapters G and I on or after November 19, 2009; and

(2) at the request of the specialty license plate sponsor, an existing specialty license plate created under Subchapters G and I before November 19, 2009.

(a-3) The department may contract with the private vendor for the vendor to:

(1) host all or some of the specialty license plates on the vendor's website;

(2) process the purchase of specialty license plates hosted on the vendor's website and pay any additional transaction cost; and

(3) share in the personalization fee for the license plates hosted on the vendor's website.

(b) The board by rule shall establish fees for the issuance or renewal of personalized license plates that are marketed and sold by the private vendor. Fees must be reasonable and not less than the greater of:

(1) the amounts necessary to allow the department to recover all reasonable costs to the department associated with the evaluation of the competitive sealed proposals received by the department and with the implementation and enforcement of the contract, including direct, indirect, and administrative costs; or

(2) the amount established by Section 504.853(b).

(c) The board by rule shall establish the fees for the issuance or renewal of souvenir license plates, specialty license plates, or souvenir or specialty license plates that are personalized that are marketed and sold by the private vendor or hosted on the private vendor's website. The state's portion of the personalization fee

may not be less than $40 for each year issued. Other fees must be reasonable and not less than the amounts necessary to allow the department to recover all reasonable costs to the department associated with the evaluation of the competitive sealed proposals received by the department and with the implementation and enforcement of the contract, including direct, indirect, and administrative costs. A fee established under this subsection is in addition to:

(1) the registration fee and any optional registration fee prescribed by this chapter for the vehicle for which specialty license plates are issued;

(2) any additional fee prescribed by this subchapter for the issuance of specialty license plates for that vehicle; and

(3) any additional fee prescribed by this subchapter for the issuance of personalized license plates for that vehicle.

(c-1) Subsections (b) and (c) do not apply to the sale at auction of a specialty plate or personalized specialty plate that is not used on a motor vehicle.

(d) At any time as necessary to comply with Subsection (b) or (c), the board may increase or decrease the amount of a fee established under the applicable subsection.

(e) The portion of a contract with a private vendor regarding the marketing and sale of personalized license plates is payable only from amounts derived from the collection of the fee established under Subsection (b). The portion of a contract with a private vendor regarding the marketing, hosting, and sale of souvenir license plates, specialty license plates, or souvenir or specialty license plates that are personalized under Sec-

tion 504.102 is payable only from amounts derived from the collection of the fee established under Subsection (c).

(f) The department may approve new design and color combinations for personalized or specialty license plates that are marketed and sold by a private vendor under a contract entered into with the private vendor. Each approved license plate design and color combination remains the property of the department.

(g) The department may approve new design and color combinations for specialty license plates authorized by this chapter, including specialty license plates that may be personalized, that are marketed and sold by a private vendor under a contract entered into with the private vendor. Each approved license plate design and color combination remains the property of the department. Except as otherwise provided by this chapter, this subsection does not authorize:

(1) the department to approve a design or color combination for a specialty license plate that is inconsistent with the design or color combination specified for the license plate by the section of this chapter that authorizes the issuance of the specialty license plate; or

(2) the private vendor to market and sell a specialty license plate with a design or color combination that is inconsistent with the design or color combination specified by that section.

(g-1) The department may not:

(1) publish a proposed design or color combination for a specialty license plate for public comment in the Texas Register or otherwise, except on the department's website for a period not to exceed 10 days;

or

(2) restrict the background color, color combinations, or color alphanumeric license plate numbers of a specialty license plate, except as determined by the Department of Public Safety as necessary for law enforcement purposes.

(h) Subject to the limitations provided by Subsections (g) and (g-1), the department may disapprove a design, cancel a license plate, or require the discontinuation of a license plate design or color combination that is marketed, hosted, or sold by a private vendor under contract at any time if the department determines that the disapproval, cancellation, or discontinuation is in the best interest of this state or the motoring public.

(i) A contract entered into by the department with a private vendor under this section:

(1) must comply with any law generally applicable to a contract for services entered into by the department;

(2) must require the private vendor to render at least quarterly to the department periodic accounts that accurately detail all material transactions, including information reasonably required by the department to support fees that are collected by the vendor, and to regularly remit all money payable to the department under the contract; and

(3) may allow or require the private vendor to establish an electronic infrastructure coordinated and compatible with the department's registration system, by which motor vehicle owners may electronically send and receive applications, other documents, or required payments, and that, when secure access is necessary, can be electronically validated by the department.

(j) From amounts received by the department under the contract described by Subsection (a), the department shall deposit to the credit of the Texas Department of Motor Vehicles fund an amount sufficient to enable the department to recover its administrative costs for all license plates issued under this section, any payments to the vendor under the contract, and any other amounts allocated by law to the Texas Department of Motor Vehicles fund. To the extent that the disposition of other amounts received by the department is governed by another law, those amounts shall be deposited in accordance with the other law. Any additional amount received by the department under the contract shall be deposited to the credit of the general revenue fund.

(k) Repealed by Acts 2011, 82nd Leg., R.S., Ch. 1296, Sec. 247(22), eff. January 1, 2012.

(l) A contract entered into with the private vendor shall provide for the department to recover all costs incurred by the department in implementing this section. Under the contract, the department may require the private vendor to reimburse the department in advance for:

(1) not more than one-half of the department's anticipated costs in connection with the contract; and

(2) the department's anticipated costs in connection with the introduction of a new specialty license plate.

(m) If the private vendor ceases operation:

(1) the program may be operated temporarily by the department under new agreements with the li-

cense plate sponsors until another vendor is selected and begins operation; and

(2) the private vendor's share of the revenue is deposited to the credit of the general revenue fund.

Added by Acts 2003, 78th Leg., ch. 1320, Sec. 6, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 754 (H.B. 2894), Sec. 1, eff. June 17, 2005.

Acts 2009, 81st Leg., R.S., Ch. 933 (H.B. 3097), Sec. 2G.03, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 9, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 1381 (S.B. 1616), Sec. 11(2), eff. September 1, 2009.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 215, eff. September 1, 2014.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 216, eff. January 1, 2012.

Acts 2011, 82nd Leg., R.S., Ch. 1296 (H.B. 2357), Sec. 247(22), eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1287 (H.B. 2202), Sec. 40, eff. September 1, 2013.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.22	**Motor Vehicle Registration**

(a) Registration. Unless otherwise exempted by law or this chapter, a vehicle to be used on the public highways of this state must be registered in accordance with Transportation Code, Chapter 502 and the provisions of this section. Transportation Code, Chapter 501, Subchapter E prohibits registration of a vehicle whose owner has been issued a salvage or nonrepairable vehicle title. These vehicles may not be operated on a public roadway.

(b) Initial application for vehicle registration.

(1) An applicant for initial vehicle registration must file an application on a form prescribed by the department. The form will at a minimum require:

(A) the signature of the owner;

(B) the motor vehicle description, including, but not limited to, the motor vehicle's year, make, model, vehicle identification number, body style, carrying capacity for commercial motor vehicles, and empty weight;

(C) the license plate number;

(D) the odometer reading, or the word "exempt" if the motor vehicle is exempt from federal and state odometer disclosure requirements;

(E) the name and complete address of the applicant; and

(F) the name, mailing address, and date of any liens.

(2) The application must be accompanied by the following documents:

(A) evidence of vehicle ownership as specified in Transportation Code, §501.030, unless the vehicle has been issued a nonrepairable or salvage vehicle title in accordance with Transportation Code, Chapter 501, Subchapter E;

(B) registration fees prescribed by law;

(C) any local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;

(D) evidence of financial responsibility required by Transportation Code, §502.046, unless otherwise exempted by law; and

(E) any other documents or fees required by law.

(3) An initial application for registration must be filed with the tax assessor-collector of the county in which the owner resides, except:

(A) an application for registration as a prerequisite to filing an application for title may also be filed with the county tax assessor-collector in the county in which the motor vehicle is purchased or encumbered; or

(B) if a county has been declared a disaster area, the resident may apply at the closest unaffected county if the affected county tax assessor-collector estimates the county offices will be inoperable for a protracted period.

(4) The recorded owner of a vehicle that was last

registered or titled in another jurisdiction and is subject to registration in this state may apply for registration if the owner cannot or does not wish to relinquish the negotiable out-of-state evidence of ownership to obtain a Texas title. On receipt of a form prescribed by the department and payment of the statutory fee for a title application and any other applicable fees, the department will issue a registration receipt to the applicant.

(A) Registration receipt. The receipt issued at the time of application may serve as proof of registration and evidences title to a motor vehicle for registration purposes only, but may not be used to transfer any interest or ownership in a motor vehicle or to establish a lien.

(B) Information to be included on the form. The form will include the:

(i) out-of-state title number, if applicable;

(ii) out-of-state license plate number, if applicable;

(iii) state or country that issued the out-of-state title or license plate;

(iv) lienholder name and address as shown on the out-of-state evidence, if applicable;

(v) statement that negotiable evidence of ownership is not being surrendered; and

(vi) signature of the applicant or authorized agent of the applicant.

(C) Accompanying documentation. An application for registration under this paragraph must be supported, at a minimum, by:

(i) a completed application for registration, as specified in paragraph (1) of this subsection;

(ii) presentation, but not surrender of, evidence from another jurisdiction demonstrating that legal evidence of ownership has been issued to the applicant as the motor vehicle's owner, such as a validated title, a registration receipt that is not more than six months past the date of expiration, a non-negotiable title, or written verification from the other jurisdiction; and

(iii) any other documents or fees required by law.

(D) Assignment. In instances in which the title or registration receipt is assigned to the applicant, an application for registration purposes only will not be processed. The applicant must apply for a title under Transportation Code, Chapter 501.

(E) Identification required.

(i) An application for initial registration is not acceptable unless the applicant presents a current photo identification of the owner containing a unique identification number and expiration date. The identification document must be a:

(I) driver's license or state identification certificate issued by a state or territory of the United States;

(II) United States or foreign passport;

(III) United States military identification card;

(IV) North Atlantic Treaty Organization identification or identification issued under a Status of Forces Agreement; or

(V) United States Department of Homeland Security, United States Citizenship and Immigration Services, or United States Department of

State identification document.

(ii) If the motor vehicle is titled in:

(I) more than one name, then the identification of one owner must be presented;

(II) the name of a leasing company, then:

(-a-) proof of the Federal Employer Identification Number/Employee Identification Number (FEIN/EIN) of the leasing company must be submitted, written on the application, and can be entered into the department's titling system. The number must correspond to the name of the leasing company in which the vehicle is being titled; and

(-b-) the leasing company may submit:

(-1-) a government issued photo identification, required under this subparagraph, of the lessee listed as the registrant; or

(-2-) a government issued photo identification, required under this subparagraph, of the employee or authorized agent who signed the application for the leasing company, and the employee's or authorized agent's employee identification, letter of authorization written on the lessor's letterhead, or a printed business card. The printed business card, employee identification, or letter of authorization written on the lessor's letterhead must contain the name of the lessor, and the employee's or authorized agent's name must match the name on the government issued photo identification;

(III) the name of a trust, then a government issued photo identification, required under this subparagraph, of a trustee must be presented; or

(IV) the name of a business, government entity, or organization, then:

(-a-) proof of the Federal Employer Identification Number/Employee Identification Number (FEIN/EIN) of the business, government entity, or organization must be submitted, written on the application, and can be entered into the department's titling system. The number must correspond to the name of the business, government entity, or organization in which the vehicle is being titled;

(-b-) the employee or authorized agent must present a government issued photo identification, required under this subparagraph; and

(-c-) the employee's or authorized agent's employee identification; letter of authorization written on the business', government entity's, or organization's letterhead; or a printed business card. The printed business card, employee identification, or letter of authorization written on the business', government entity's, or organization's letterhead must contain the name of the business, governmental entity, or organization, and the employee's or authorized agent's name must match the name on the government issued photo identification.

(iii) Within this subparagraph, "current" is defined as not to exceed 12 months after the expiration date, except that a state-issued personal identification certificate issued to a qualifying person is considered current if the identification states that it has no expiration.

(iv) Within this subsection, an identification document such as a printed business card, letter of authorization, or power of attorney, may be an original

or photocopy.

(v) A person who holds a general distinguishing number issued under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, is exempt from submitting to the county tax assessor-collector, but must retain:

(I) the owner's identification, as required under this subparagraph; and

(II) authorization to sign, as required under this subparagraph.

(vi) A person who holds a general distinguishing number issued under Transportation Code, Chapter 503 or Occupations Code, Chapter 2301, is not required to submit photo identification or authorization for an employee or agent signing a title assignment with a secure power of attorney.

(vii) This subparagraph does not apply to non-titled vehicles.

(c) Vehicle registration insignia.

(1) On receipt of a complete initial application for registration with the accompanying documents and fees, the department will issue vehicle registration insignia to be displayed on the vehicle for which the registration was issued for the current registration period.

(A) If the vehicle has a windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the inside lower left corner of the vehicle's front windshield in a manner that will not obstruct the vision of the driver.

(B) If the vehicle has no windshield, the symbol, tab, or other device prescribed by and issued by the department shall be attached to the rear license plate, except that registration receipts, retained inside

the vehicle, may provide the record of registration for vehicles with permanent trailer plates.

(C) If the vehicle is registered as a former military vehicle as prescribed by Transportation Code, §504.502, the vehicle's registration number shall be displayed instead of displaying a symbol, tab, or license plate.

(i) Former military vehicle registration numbers shall be displayed on a prominent location on the vehicle in numbers and letters of at least two inches in height.

(ii) To the extent possible, the location and design of the former military vehicle registration number must conform to the vehicle's original military registration number.

(2) Unless otherwise prescribed by law, each vehicle registered under this subchapter:

(A) must display two license plates, one at the exterior front and one at the exterior rear of the vehicle that are securely fastened at the exterior front and rear of the vehicle in a horizontal position of not less than 12 inches from the ground, measuring from the bottom, except that a vehicle described by Transportation Code, §621.2061 may place the rear plate so that it is clearly visible; or

(B) must display one plate that is securely fastened at or as close as practical to the exterior rear of the vehicle in a position not less than 12 inches from the ground, measuring from the bottom if the vehicle is a road tractor, motorcycle, trailer or semitrailer.

(3) Each vehicle registered under this subchapter must display license plates:

(A) assigned by the department for the pe-

riod; or

(B) validated by a registration insignia issued by the department for a registration period consisting of 12 consecutive months at the time of application for registration. Vehicles may be registered for 24 consecutive months only in accordance with Transportation Code, §548.102.

(4) The department will cancel or not issue any license plate containing an alpha-numeric pattern that meets one or more of the following criteria.

(A) The alpha-numeric pattern conflicts with the department's current or proposed regular license plate numbering system.

(B) The executive director finds that the alpha-numeric pattern may be considered objectionable or misleading, including that the pattern may be viewed as, directly or indirectly:

(i) indecent (defined as including a reference to a sex act, an excretory function or material, or sexual body parts);

(ii) a vulgarity (defined as curse words);

(iii) derogatory (defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions);

(iv) a reference to illegal activities or substances, or implied threats of harm; or

(v) a misrepresentation of law enforcement or other governmental entities and their titles.

(C) The alpha-numeric pattern is currently issued to another owner.

(5) The provisions of paragraph (1) of this subsection do not apply to vehicles registered with annual license plates issued by the department.

(d) Vehicle registration renewal.

(1) To renew vehicle registration, a vehicle owner must apply, prior to the expiration of the vehicle's registration, to the tax assessor-collector of the county in which the owner resides.

(2) The department will send a license plate renewal notice, indicating the proper registration fee and the month and year the registration expires, to each vehicle owner prior to the expiration of the vehicle's registration.

(3) The license plate renewal notice should be returned by the vehicle owner to the appropriate county tax assessor-collector or to the tax assessor-collector's deputy, either in person or by mail, unless the vehicle owner renews via the Internet. The renewal notice must be accompanied by the following documents and fees:

(A) registration renewal fees prescribed by law;

(B) any local fees or other fees prescribed by law and collected in conjunction with registration renewal; and

(C) evidence of financial responsibility required by Transportation Code, §502.046, unless otherwise exempted by law.

(4) If a renewal notice is lost, destroyed, or not received by the vehicle owner, the vehicle may be registered if the owner presents personal identification acceptable to the county tax assessor-collector. Failure to receive the notice does not relieve the owner of the responsibility to renew the vehicle's registration.

(5) Renewal of expired vehicle registrations.

(A) In accordance with Transportation Code, §502.407, a vehicle with an expired registration may not be operated on the highways of the state after the fifth working day after the date a vehicle registration expires.

(B) If the owner has been arrested or cited for operating the vehicle without valid registration then a 20 percent delinquency penalty is due when registration is renewed, the full annual fee will be collected, and the vehicle registration expiration month will remain the same.

(C) If the county tax assessor-collector or the department determines that a registrant has a valid reason for being delinquent in registration, the vehicle owner will be required to pay for twelve months' registration. Renewal will establish a new registration expiration month that will end on the last day of the eleventh month following the month of registration renewal.

(D) If the county tax assessor-collector or the department determines that a registrant does not have a valid reason for being delinquent in registration, the full annual fee will be collected and the vehicle registration expiration month will remain the same.

(E) If a vehicle is registered in accordance with Transportation Code, §§502.255, 502.431, 502.435, 502.454, 504.315, 504.401, 504.405, 504.505, or 504.515 and if the vehicle's registration is renewed more than one month after expiration of the previous registration, the registration fee will be prorated.

(F) Evidence of a valid reason may include receipts, passport dates, and military orders. Valid reasons may include:

(i) extensive repairs on the vehicle;

(ii) the person was out of the country;

(iii) the vehicle is used only for seasonal use;

(iv) military orders;

(v) storage of the vehicle;

(vi) a medical condition such as an extended hospital stay; and

(vii) any other reason submitted with evidence that the county tax assessor-collector or the department determines is valid.

(6) Refusal to renew registration for delinquent child support.

(A) Placement of denial flag. On receipt of a notice issued under Family Code, Chapter 232 for the suspension or nonrenewal of a motor vehicle registration, the department will place a registration denial flag on the motor vehicle record of the child support obligor as reported by the child support agency.

(B) Refusal to renew registration. While a motor vehicle record is flagged, the county tax-assessor collector shall refuse to renew the registration of the associated motor vehicle.

(C) Removal of denial flag. The department will remove the registration denial flag on receipt of a removal notice issued by a child support agency under Family Code, Chapter 232.

(7) License plate reissuance program. The county tax assessor-collectors shall issue new multi-year license plates at no additional charge at the time of registration renewal provided the current plates are over seven years old from the date of issuance, including permanent trailer plates.

(e) Replacement of license plates, symbols, tabs, and other devices.

(1) When a license plate, symbol, tab, or other registration device is lost, stolen, or mutilated, a replacement may be obtained from any county tax assessor-collector upon:

(A) the payment of the statutory replacement fee prescribed by Transportation Code, §502.060 or §504.007; and

(B) the provision of a signed statement, on a form prescribed by the department, that states:

(i) the license plate, symbol, tab, or other registration device furnished for the described vehicle has been lost, stolen, or mutilated, and if recovered, will not be used on any other vehicle; and

(ii) the replaced license plate, symbol, tab, or other device will only be used on the vehicle to which it was issued.

(2) If the owner remains in possession of any part of the lost, stolen, or mutilated license plate, symbol, tab, or other registration device, that remaining part must be removed and surrendered to the department on issuance of the replacement and request by the county tax assessor-collector.

(f) Commercial farm motor vehicles, farm trailers, and farm semitrailers.

(1) An applicant must provide a properly completed application for farm plates. The application must be accompanied by proof of the applicant's Texas Agriculture or Timber Exemption Registration Number issued by the Texas Comptroller of Public Accounts. Proof of the registration number must be:

(A) legible;

(B) current; and

(C) in the name of the person or dba in which the vehicle is or will be registered, pursuant to Transportation Code, §502.146 and §502.433.

(2) A registration renewal of farm plates must be accompanied by proof of the applicant's Texas Agriculture or Timber Exemption Registration Number issued by the Texas Comptroller of Public Accounts.

(3) In accordance with Transportation Code, §502.146 and §502.433, an applicant's Texas Agriculture or Timber Exemption Registration Number may be verified through the online system established by the Comptroller.

(g) Out-of-state vehicles. A vehicle brought to Texas from out-of-state must be registered within 30 days of the date on which the owner establishes residence or secures gainful employment, except as provided by Transportation Code, §502.090. Accompanying a completed application, an applicant must provide:

(1) an application for title as required by Transportation Code, Chapter 501, if the vehicle to be registered has not been previously titled in this state; and

(2) any other documents or fees required by law.

(h) Electric personal assistive mobility device. The owner of an electric personal assistive mobility device, as defined by Transportation Code, §551.201, is not required to register it. The device may only be operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.202.

(i) Neighborhood electric vehicle. A neighborhood electric vehicle operated on a residential street, roadway, or public highway in accordance with Transportation Code, §551.303:

(1) must comply with the evidence of financial responsibility requirements established in Transportation Code, §502.046;

(2) must display a "slow-moving-vehicle emblem" if it meets the definition of a "slow-moving vehicle" as described in Transportation Code, §547.001; and

(3) is subject to all traffic and other laws applicable to motor vehicles.

(j) Enforcement of traffic warrant. A municipality may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle is a person for whom a warrant of arrest is outstanding for failure to appear or who has failed to pay a fine on a complaint involving a violation of a traffic law. In accordance with Transportation Code, §702.003, a county tax assessor-collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. A municipality is responsible for obtaining the agreement of the county in which the municipality is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the municipality.

(k) Refusal to register due to traffic signal violation. A local authority, as defined in Transportation Code, §541.002, that operates a traffic signal enforcement program authorized under Transportation Code, Chapter 707 may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of a motor vehicle has failed to pay the civil penalty for a violation of the local authority's traffic signal enforcement system involving that motor vehicle. In accordance with Transportation Code, §707.017, a county tax assessor-collector

may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle. The local authority is responsible for obtaining the agreement of the county in which the local authority is located to refuse to register motor vehicles for failure to pay civil penalties imposed by the local authority.

(l) Refusal to register vehicle in certain counties. A county may enter into a contract with the department under Government Code, Chapter 791 to indicate in the state's motor vehicle records that the owner of the vehicle has failed to pay a fine, fee, or tax that is past due. In accordance with Transportation Code, §502.010, a county tax assessor- collector may refuse to register a motor vehicle if such a failure is indicated in the motor vehicle record for that motor vehicle.

(m) Record notation. A contract between the department and a county, municipality, or local authority entered into under Transportation Code, §502.010, Transportation Code, §702.003, or Transportation Code, §707.017 will contain the terms set out in this subsection.

(1) To place or remove a registration denial flag on a vehicle record, the contracting entity must submit a magnetic tape or other acceptable submission medium as determined by the department in a format prescribed by the department.

(2) The information submitted by the contracting entity will include, at a minimum, the vehicle identification number and the license plate number of the affected vehicle.

(3) If the contracting entity data submission contains bad or corrupted data, the submission medium will be returned to the contracting entity with no further action by the department.

(4) The magnetic tape or other submission medium must be submitted to the department from a single source within the contracting entity.

(5) The submission of a magnetic tape or other submission medium to the department by a contracting entity constitutes a certification by that entity that it has complied with all applicable laws.

(n) Fees.

(1) The department and the county will charge required fees, and only those fees provided by statute or rule.

(2) A $2 fee for a duplicate registration receipt will be charged if a receipt is printed for the customer.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.28	**Specialty License Plates, Symbols, Tabs, and Other Devices**

(b) Initial application for specialty license plates, symbols, tabs, or other devices.

(2) Fees and Documentation.

(A) The application must be accompanied by the prescribed registration fee, unless exempted by statute.

(B) The application must be accompanied by the statutorily prescribed specialty license plate fee. If a registration period is greater than 12 months, the expiration date of a specialty license plate, symbol, tab, or other device will be aligned with the registration period and the specialty plate fee will be adjusted to yield the appropriate fee. If the statutory annual fee for a specialty license plate is $5 or less, it will not be prorated.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.28	**Specialty License Plates, Symbols, Tabs, and Other Devices**

(i) Development of new specialty license plates.

...

(5) Board decision. The Board's decision will be based on:

(A) compliance with Transportation Code, §504.801;

(B) the proposed license plate design, including:

(i) whether the design appears to meet the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness;

(iii) other information provided during the application process;

(iv) the criteria designated in §217.22(c)(3)(B) of this subchapter as applied to the design; and

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and

(C) the applicant's ability to comply with Transportation Code, §504.702 relating to the required deposit or application that must be provided before the manufacture of a new specialty license plate.

...

(7) Final approval.

(A) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter at an open meeting.

(B) Application not approved. If the application is not approved under subparagraph (A) of this paragraph, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(i) the applicant has additional, required documentation; or

(ii) the design has been altered to an acceptable degree.

(8) Issuance of specialty plates.

(A) If the specialty license plate is approved, the applicant must comply with Transportation Code, §504.702 before any further processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval authority of all specialty license plate designs and may adjust or reconfigure the submitted draft design to comply with the format or license plate specifications.

Texas Administrative Code

TITLE 43	TRANSPORTATION
PART 10	TEXAS DEPARTMENT OF MOTOR VEHICLES
CHAPTER 217	VEHICLE TITLES AND REGISTRATION
SUBCHAPTER B	MOTOR VEHICLE REGISTRATION
RULE §217.40	**Marketing of Specialty License Plates through a Private Vendor**

(a) Purpose and scope. The department will enter into a contract with a private vendor to market department-approved specialty license plates in accordance with Transportation Code, Chapter 504, Subchapter J. This section sets out the procedure for approval of the design, purchase, and replacement of vendor specialty license plates. In this section, the license plates marketed by the vendor are referred to as vendor specialty license plates.

(b) Application for approval of vendor specialty license plate designs.

(1) Approval required. The vendor shall obtain the approval of the Board for each license plate design the vendor proposes to market in accordance with this section and the contract entered into between the vendor and the department.

(2) Application. The vendor must submit a written application on a form approved by the executive director to the department for approval of each license plate design the vendor proposes to market. The application must include:

(A) a draft design of the specialty license plate;

(B) projected sales of the plate, including an explanation of how the projected figure was determined;

(C) a marketing plan for the plate including a description of the target market;

(D) a licensing agreement from the appropriate third party for any design or design element that is intellectual property; and

(E) other information necessary for the Board to reach a decision regarding approval of the requested vendor specialty plate.

(c) Review and approval process. The Board will review vendor specialty license plate applications. The Board:

(1) will not consider incomplete applications; and

(2) may request additional information from the vendor to reach a decision.

(d) Board decision.

(1) Decision. The decision of the Board will be based on:

(A) compliance with Transportation Code, Chapter 504, Subchapter J;

(B) the proposed license plate design, including:

(i) whether the design meets the legibility and reflectivity standards established by the department;

(ii) whether the design meets the standards established by the department for uniqueness to ensure that the proposed plate complies with Transportation Code, §504.852(c);

(iii) whether the license plate design can accommodate the International Symbol of Access (ISA) as required by Transportation Code, §504.201(f);

(iv) the criteria designated in §217.22(c)(4)(B) of this subchapter (relating to Motor Vehicle Registration) as applied to the design;

(v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales;

and

(vi) other information provided during the application process.

(2) Public comment on proposed design. All proposed plate designs will be considered by the Board as an agenda item at a regularly or specially called open meeting. Notice of consideration of proposed plate designs will be posted in accordance with Office of the Secretary of State meeting notice requirements. Notice of each license plate design will be posted on the department's Internet web site to receive public comment at least 25 days in advance of the meeting at which it will be considered. The department will notify all specialty plate organizations and the sponsoring agencies who administer specialty license plates issued in accordance with Transportation Code, Chapter 504, Subchapter G, of the posting. A comment on the proposed design can be submitted in writing through the mechanism provided on the department's Internet web site for submission of comments. Written comments are welcome and must be received by the department at least 10 days in advance of the meeting. Public comment will be received at the Board's meeting.

(e) Final approval and specialty license plate issuance.

(1) Approval. The Board will approve or disapprove the specialty license plate application based on all of the information provided pursuant to this subchapter in an open meeting.

(2) Application not approved. If the application is not approved, the applicant may submit a new application and supporting documentation for the design to be considered again by the Board if:

(A) the applicant has additional, required documentation; or

(B) the design has been altered to an acceptable degree.

(3) Issuance of approved specialty plates.

(A) If the vendor's specialty license plate is approved, the vendor must submit the non-refundable start-up fee before any further design and processing of the license plate.

(B) Approval of the plate does not guarantee that the submitted draft plate design will be used. The Board has final approval of all specialty license plate designs and will provide guidance on the submitted draft design to ensure compliance with the format and license plate specifications.

(f) Redesign of vendor specialty license plates.

(1) On receipt of a written request from the vendor, the department will allow a redesign of a vendor specialty license plate.

(2) The vendor must pay the redesign administrative costs as provided in the contract between the vendor and the department.

(g) Multi-year vendor specialty license plates. Purchasers will have the option of purchasing vendor spe-

cialty license plates for a one-year, five-year, or ten-year period.

(h) License plate categories and associated fees. The categories and the associated fees for vendor specialty plates are set out in this subsection.

(1) Custom license plates. The fees for issuance of custom license plates are $85 for one year, $225 for five years, and $325 for ten years. Custom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with either three alpha and two or three numeric characters or two or three numeric and three alpha characters. Generic license plates on standard white sheeting with the word "Texas" that may be personalized with up to six alphanumeric characters are considered custom license plates before December 2, 2010.

(2) T-Plates (Premium) license plates. T-Plates (Premium) license plates may be personalized with up to seven alphanumeric characters on colored backgrounds or designs approved by the department. T-Plates (Premium) license plates will be made available to coincide with extraordinary events of public interest to Texas registrants. The fees for issuance of T-Plates (Premium) license plates are $95 for one year until December 2, 2010, $155 for one year on or after December 2, 2010, $395 for five years, and $495 for ten years.

(3) Luxury license plates. Luxury license plates may be personalized with up to six alphanumeric characters on colored backgrounds or designs approved by the department. The fees for issuance of luxury license plates are $195 for one year, $495 for five years, and $595 for ten years.

(4) Freedom license plates. Freedom license plates include license plates with a variety of pre-approved background and character color combinations that may be personalized with up to seven alphanumeric characters. The fees for issuance of freedom license plates are $395 for one year, $695 for five years, and $795 for ten years.

(5) Background only license plates. Background only license plates include non-personalized license plates with a variety of pre-approved background and character color combinations. The fees for issuance of background only license plates are $55 for one year, $195 for five years, and $295 for ten years.

(6) Vendor souvenir license plates. Vendor souvenir license plates are replicas of vendor specialty license plate designs that may be personalized with up to twenty-four alphanumeric characters. Vendor souvenir license plates are not street legal or legitimate insignias of vehicle registration. The fee for issuance of souvenir license plates is $40.

(7) Auction of alphanumeric patterns. The vendor may auction alphanumeric patterns for 10 or 25 year terms with options to renew indefinitely, through 10 year terms, at the current price established for a 10 year luxury category license plate. The purchaser of the auction pattern may select from the vendor background designs at no additional charge at the time of initial issuance. The auction pattern may be moved from one vendor design plate to another vendor design plate as provided in subsection (n)(1) of this section. The auction pattern may be transferred from owner to owner as provided in subsection (l)(2) of this section.

(8) Personalization and specialty plate fees.

(A) The fee for the personalization of license plates applied for prior to November 19, 2009 is $40 if the plates are renewed annually.

(B) The personalization fee for plates applied for after November 19, 2009 is $40 if the plates are issued pursuant to Transportation Code, Chapter 504, Subchapters G and I.

(C) If the plates are renewed annually, the personalization and specialty plate fees remain the same fee as at the time of issuance if a sponsor of a specialty license plate authorized under Transportation Code, Chapter 504, Subchapters G and I signs a contract with the vendor in accordance with Transportation Code, Chapter 504, Subchapter J.

(i) Payment of fees.

(1) Payment of specialty license plate fees. The fees for issuance of vendor specialty license plates will be paid directly to the vendor for the license plate category and period selected by the purchaser. A person who purchases a multi-year vendor specialty license plate must pay upon purchase the full fee which includes the renewal fees.

(2) Payment of statutory registration fees. To be valid for use on a motor vehicle, the license plate owner is required to pay, in addition to the vendor specialty license plate fees, any statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

(j) Refunds. Fees for vendor specialty license plate fees will not be refunded after an application is submitted to the vendor and the department has approved issuance of the license plate.

(k) Replacement.

(1) Application. An owner must apply directly to the county tax assessor-collector for the issuance of replacement vendor specialty license plates and must pay the fee described in paragraphs (2), (3), or (4) of this subsection, whichever applies.

(2) Lost or mutilated vendor specialty license plates. To replace vendor specialty license plates that are lost or mutilated, the owner must pay the statutory replacement fee provided in Transportation Code, §504.007.

(3) No-charge replacement. The owner of vendor specialty license plates will receive at no charge replacement license plates as follows:

(A) one set of replacement license plates on or after the seventh anniversary after the date of initial issuance; and

(B) one set of replacement license plates seven years after the date the set of license plates were issued in accordance with subparagraph (A) of this paragraph.

(4) Optional replacements. An owner of a vendor specialty license plate may replace vendor specialty license plates before the seventh anniversary after the date of issuance by submitting a request to the county tax assessor-collector accompanied by the payment of a $6 fee.

(5) Interim replacement tags. If the vendor specialty license plates are lost or mutilated to such an extent that they are unusable, replacement license plates will need to be remanufactured. The county tax assessor-collector will issue interim replacement tags for use until the replacements are available. The owner's vendor specialty license plate number will be shown on the interim

replacement tags.

(6) Stolen vendor specialty license plates. The county tax assessor-collector will not approve the issuance of replacement vendor specialty license plates with the same license plate number if the department's records indicate that the vehicle displaying that license plate number was reported stolen or the license plates themselves were reported stolen.

(l) Transfer of vendor specialty license plates.

(1) Transfer between vehicles. The owner of a vehicle with vendor specialty license plates may transfer the license plates between vehicles by filing an application through the county tax assessor-collector if the vehicle to which the plates are transferred:

(A) is titled or leased in the owner's name; and

(B) meets the vehicle classification requirements for that particular specialty license plate.

(2) Transfer between owners. Vendor specialty license plates may not be transferred between persons unless the license plate pattern was initially purchased through auction as provided in subsection (h)(7) of this section. An auctioned alphanumeric pattern may be transferred as a specialty license plate or as a virtual pattern to be manufactured on a new background as provided under the restyle option in subsection (n)(1) of this section. In addition to the fee paid at auction, the new owner of an auctioned alphanumeric pattern or plate will pay the department a fee of $25 and complete the department's prescribed application at the time of transfer.

(m) Gift plates.

(1) A person may purchase plates as a gift for another person if the purchaser submits a statement that

provides:

(A) the purchaser's name and address;

(B) the name and address of the person who will receive the plates; and

(C) the vehicle identification number of the vehicle on which the plates will be displayed or a statement that the plates will not be displayed on a vehicle.

(2) To be valid for use on a motor vehicle, the recipient of the plates must file an application with the county tax assessor-collector and pay the statutorily required registration fees in the amount as provided by Transportation Code, Chapter 502, and this subchapter.

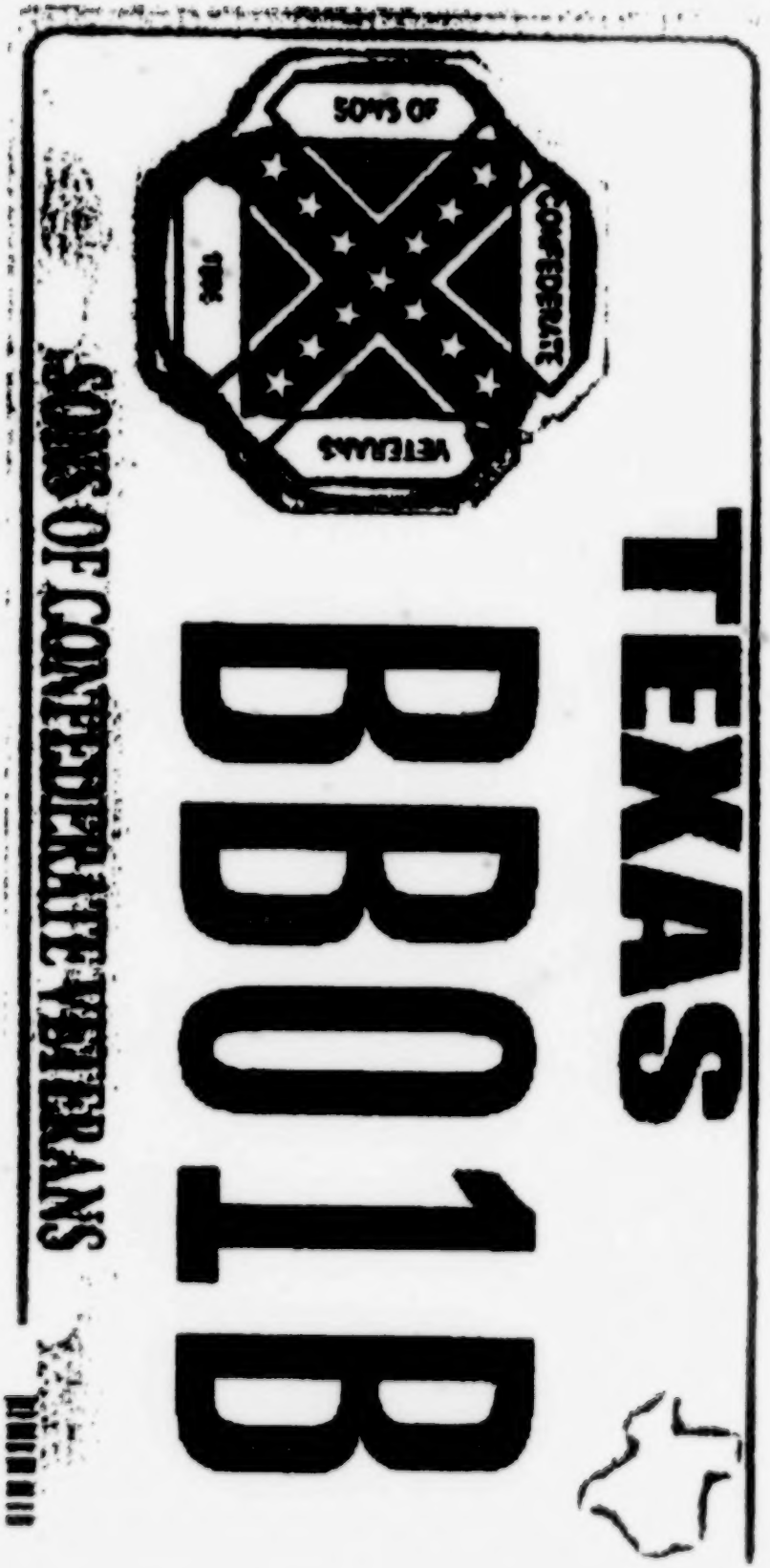
(n) Restyled vendor specialty license plates. A person who has purchased a multi-year vendor specialty license plate may request a restyled license plate at any time during the term of the plate.

(1) For the purposes of this subsection, "restyled license plate" is a vendor specialty license plate that has a different style from the originally purchased vendor specialty license plate but:

(A) is within the same price category, except if the pattern is an auction pattern; and

(B) has the same alpha-numeric characters and expiration date as the previously issued multi-year license plates.

(2) The fee for each restyled license plate is $55.


SONS OF CONFEDERATE VETERANS
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VETERANS
TEXAS
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No. 14-144

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a state establish a program for private individuals, non-profit organizations, and businesses to design specialty license plates, and then deny access to an eligible non-profit organization because the organization's logo featuring the Confederate battle flag "might be offensive to any member of the public"?

CORPORATE DISCLOSURE STATEMENT

Texas Division, Sons of Confederate Veterans, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

The Fifth Circuit's opinion accurately describes the specialty license plate system in Texas. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 390-91 (5th Cir. 2014); Pet. App. 2a-3a.[1] In short, specialty license plates are either (a) created by the legislature by specific legislation[2] or (b) designed by private individuals, non-profits, and businesses who submit their applications to the Texas Department of Motor Vehicles ("DMV") directly or through a third-party vendor in contract with the state.[3] Essentially, Texas has created a program through which it sells space on license plates for individuals, non-profits, and businesses to publish messages and advertising. Drivers who wish to express a message pay a premium for such specialty

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[1] In this brief, "App. ___" refers to the page in Texas SCV's Record Excerpts filed in the Fifth Circuit Court of Appeals. "USCA5 ___" refers to the page in the Record on Appeal filed in the Fifth Circuit Court of Appeals. "Pet. ___" and "Pet. App. ___" refer to the pages in the Petition for Writ of Certiorari and its Appendix, respectively.

[2] *See* Tex. Transp. Code §§ 504.601, 504.602-504.662. Some examples of plates made available by statute in Texas include "Animal Friendly," "Keep Texas Beautiful," "Texas Reads," and a Daughters of the Republic of Texas plate that reads "Native Texan." Tex. Transp. Code §§ 504.602, 504.605, 504.616, 504.637.

[3] Non-profit organizations can send their application directly to the DMV, but individuals and for-profit businesses must submit their applications through the third-party vendor who helps facilitate and market specialty plates. The DMV must still approve plates submitted to the third-party vendor.

plates and the program results in increased revenue to the state.

The more than 350 specialty plates available in Texas express a wide variety of messages. Some of the specialty plates available to Texas drivers are: Choose Life, Calvary Hill ("One State Under God"), God Bless Texas, Knights of Columbus ("One Nation Under God"), Buffalo Soldiers, Insure Texas Kids, Boy Scouts, Girl Scouts, Texas Masons, Texas Lions Camp, Rotary International, March of Dimes, Be a Blood Donor, College for All Texans, Enduring Freedom, Fight Terrorism, Korea Veterans, Vietnam Veteran, Former Prisoner of War, Woman Veteran, World War II Veterans, Mothers Against Drunk Driving, NASCAR, Operation Iraqi Freedom, Pearl Harbor Survivor, Organ Donor, Rather Be Golfing, Read to Succeed, Stop Child Abuse, Texas It's Like a Whole Other Country, United We Stand, World Wildlife Fund, University of Alabama, University of Arizona, University of Arkansas, University of Georgia, University of Illinois, University of Kansas, University of Kentucky, University of Louisiana, University of Mississippi, University of Missouri, University of Nebraska, University of Oklahoma, University of South Carolina, University of Tennessee, Notre Dame, Oklahoma State University, Re/Max, Dr. Pepper, Mighty Fine Burgers, Master Gardener, Share the Road, YMCA, Young Lawyers Association,

Texas State Rifle Association, Texas Trophy Hunters Association, and Animal Friendly.[4]

The Fifth Circuit opinion accurately describes Texas Sons of Confederate Veterans' ("Texas SCV's") application for a specialty license plate and the "tortured procedural history" at the Texas Department of Transportation ("TxDOT") and Texas Department of Motor Vehicles Board ("DMVB"). Pet. App. 3a-5a, 17a-18a. The plate, including the Confederate battle flag in Texas SCV's logo, was initially approved by a simple majority vote.[5] Despite no evidence of any procedural basis for taking another vote, a second vote was conducted and the plate was

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[4] *See* examples included at App. 110-111, USCA5 324-325. *See also* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates, last visited 9/25/14.

[5] The committee at TxDOT in charge of approving specialty plates at the time initially approved the plate by a simple majority vote. App. 103, USCA5 280. But the Director of the Vehicle Titles and Registration Division maintained that the plate did not pass and suggested that Texas SCV be notified that its application was rejected. *Id.* In response, another board member emailed the following: "Since it is now documented that we had a quorum and that the plate passed by a simple majority. I don't think we can just declare a no pass. An open records request would expose the vote and we will be shown as biased. I believe we should follow the procedures and let the public decide!" *Id.* Upon the Director's insistence that there be a re-vote based upon the "controversial" nature of the plate, a re-vote was conducted, and the plate was rejected. *See* App. 106, USCA5 293. There is no evidence of a valid procedural basis for the committee ignoring the initial quorum vote.

rejected. *See* App. 106, USCA5 293. Texas SCV then reapplied with the DMVB, which deadlocked four to four in two votes and then ultimately denied the plate unanimously after an impassioned public hearing. App. 80, ¶¶ 17, 20, USCA5 254; App. 118-119, USCA5 445-446.

At the same hearing, the DMVB approved a Buffalo Soldiers plate by a five to three vote, despite the fact that Land Commissioner Jerry Patterson, who sponsored both the Texas SCV and the Buffalo Soldiers plates, told the DMVB at the hearing that he had had conversations "with a group of Indians, who were offended by the . Buffalo Soldier plate." USCA5 377; App. 121, USCA5 451.

In its written rejection of Texas SCV's application for a specialty plate, the DMVB stated:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.

App. 108, USCA5 322. The Board cited a provision of the Texas Transportation Code which provides, in part, that the Board "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code § 504.801(c).

Following the denial of its application for a specialty plate, Texas SCV filed the underlying lawsuit challenging the DMVB's decision as unconstitutional under the First and Fourteenth Amendments to the Constitution.

The district court granted the DMVB's motion for summary judgment and denied Texas SCV's motion for summary judgment. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, A-11-CA-1049-SS, 2013 WL 1562758 (W.D. Tex. Apr. 12, 2013). The court held that the specialty plates implicated private speech concerns but found no viewpoint discrimination. *Id.* The Fifth Circuit reversed and remanded, holding that the specialty plates were private speech and the State engaged in viewpoint discrimination in denying Texas SCV's specialty plate. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

This case is not as complicated or remarkable as Petitioners would have this Court believe. There is no circuit split applicable to these facts, as every circuit to address a specialty plate program enabling private parties to submit their own specialty plate designs has held that the plates constitute private speech, the First Amendment applies, and regulation has to be viewpoint neutral. Neither of the two circuit splits Petitioners assert is applicable to the facts of this

case. Further, First Amendment case law has long-established that "offensiveness" is not a permissible standard to limit speech. Decades of Supreme Court precedent have established (1) that the State cannot open a forum for speech and then deny access to that forum on the basis of viewpoint and (2) that "offensiveness" is not a permissible standard to restrict speech. This case presents no novel questions or circuit splits for this Court to resolve, and the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT SPLITS DESCRIBED BY PETITIONERS ARE NOT APPLICABLE TO THIS CASE

Petitioners argue there is a circuit split about whether specialty plates are "private speech" or "government speech." However, Petitioners fail to point out that there are two kinds of cases considered by the various courts of appeals. First, there are cases involving specialty license plates created by specific individual enabling legislation (hereinafter "Legislative Plates") passed by a state legislature. Second, there are cases where the state has created a revenue generating program by selling space on license plates to private citizens to express themselves. In this second category, private individuals and organizations apply to a state agency, such as the DMVB in this case, to have their own designs published on specialty license plates.

This case is in the second category. Respondents are not complaining of any specialty plate issued by an individual act of the Texas legislature. The Texas legislature has passed legislation authorizing "Animal Friendly," "Keep Texas Beautiful" and many other plates, which are all unchallenged. Instead, Texas SCV and its members sought to communicate their message in the same manner as many other non-profit organizations in Texas have done, by designing a specialty license plate. After being denied access to the forum because Texas SCV's logo was deemed "offensive," Texas SCV filed suit.

A. EVERY COURT OF APPEALS TO ADDRESS THE TYPE OF SPECIALTY PLATE AT ISSUE HERE HAS HELD THAT THE FIRST AMENDMENT APPLIES AND STATE REGULATION MUST BE VIEWPOINT NEUTRAL

Every circuit to address the type of specialty plate program at issue here – specialty plates designed by individuals, non-profit organizations, and/or for-profit businesses pursuant to a program for private parties to apply for plates, as opposed to specialty plates designed by state legislatures through individual legislation – has held that the specialty plates implicate private speech concerns and that government regulation must comply with the First Amendment. *See Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization

license plate program" was primarily private speech and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner); *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014). Including the Fifth Circuit, there have now been three circuit courts of appeals to address the type of specialty plates at issue here, and each one of them has concluded that the specialty plates at issue in this type of program implicate private speech and the state's regulation of them must be viewpoint neutral.[6]

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[6] The courts of appeals engage in a variety of linguistic formulations of the test to be applied to determine whether speech is "private" or "government." *See Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (applying a four-factor test which includes (1) the central purpose of the program in which the speech occurs, (2) the degree of "editorial control" exercised by the government or by private entities over the content of the speech, (3) the identity of the "literal speaker," and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech); *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006) (legislative "Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates"); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) (distilling the four-factor test to whether, under all the circumstances, a reasonable person would consider the speaker to be the government or a private party); *Arizona Life Coalition*, 515 F.3d at 965 (applying Fourth Circuit's

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B. THE CIRCUIT SPLIT REGARDING PLATES DESIGNED BY STATE LEGISLATURES IS NOT APPLICABLE TO THIS CASE

There is indeed a circuit split between the Fourth Circuit and the Sixth Circuit with regard to specialty plates, but the split only involves plates created by specific legislative enactment. The Sixth Circuit held in 2006 that Tennessee's legislature did *not* violate the First Amendment by creating a "Choose Life" plate while not offering a pro-choice plate.[7] *ACLU v.*

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four-factor test); *Roach*, 560 F.3d at 867 ("Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party."); *Texas Div., Sons of Confederate Veterans, Inc.*, 759 F.3d at 394 ("the proper inquiry is 'whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige' "), quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 487 (2009) (Souter, J., concurring). For the purposes of deciding the petition for certiorari, however, evaluating the different formulas for determining whether the First Amendment is implicated is unnecessary because every circuit to address the same specialty plate program as this case has held that private speech is implicated and the First Amendment applies, regardless of the test applied.

[7] The Sixth Circuit stands alone in holding that specialty license plates do not implicate private speech concerns. All other circuits to address specialty plates, of any type, have held that they implicate private speech concerns and government regulation is subject to the First Amendment. *See Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dept. of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) ("SCV's special plates constitute private speech."); *Arizona Life Coalition*, 515 F.3d at

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Bredesen, 441 F.3d 370, 375-77 (6th Cir. 2006), *cert. denied*, 434 U.S. 1070 (2006). The court held that the plate created by legislative enactment was government speech, and did not implicate private speech rights. *Id.* at 375 ("Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates."). The Fourth Circuit reached the opposite conclusion on similar facts in 2014, holding that North Carolina *did* violate the First Amendment in creating a "Choose Life" plate while not offering a pro-choice plate. *American Civil Liberties Union of North Carolina v. Tata*, 742 F.3d 563, 576 (4th Cir. 2014), *pet. filed.* ("Because the specialty plate speech at issue implicates private speech rights and is not pure government speech, North Carolina's authorizing a 'Choose Life' plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.")[8] Both of these

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965 ("Choose Life" plate was private speech); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("Messages on specialty license plates cannot be characterized as the government's speech"); *Roach*, 560 F.3d at 867 (specialty plates are private speech); *Texas Div., Sons of Confederate Veterans, Inc.*, 759 F.3d at 396 (same). *See also Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (noting, *in dicta*, that the specialty plates at issue were not government speech); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (New Hampshire violated First Amendment rights of objecting drivers by requiring them to display the state motto "Live Free or Die" on their license plates).

[8] *See* Petition for a Writ of Certiorari, *Berger v. ACLU of N.C.*, No. 14-35 (July 11, 2014).

cases considered the question of when a state legislature authorizes a pro-life plate by statute, does the First Amendment require the issuance of a pro-choice plate? At issue was not a denial of a private speaker's application for a specialty plate pursuant to a program established for such speech. These cases indeed constitute a split of authority, but they involve Legislative Plates and not a specialty plate program established for private parties to design specialty plates. The circuit split is therefore not applicable to the facts of this case, and this case is not a vehicle for addressing such a split.

C. THE SEVENTH CIRCUIT'S DECISION IN *CHOOSE LIFE ILLINOIS* DOES NOT EVIDENCE A CIRCUIT SPLIT RELEVANT TO THIS CASE

Petitioners also argue – despite no evidence in the record to support this theory – that Texas is purposefully avoiding the subject of the Confederate flag entirely, and thus there is no viewpoint discrimination. *See* Pet. at 14-17. Petitioners argue there is a circuit split between the Fifth Circuit decision in this case and the Seventh Circuit decision in *Choose Life Ill. Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009).

In *Choose Life Illinois*, a pro-life advocacy group sought a specialty plate, which in Illinois required a specific legislative enactment. The General Assembly failed to pass enabling legislation to create a "Choose

Life" plate, and the advocacy group sued. The Seventh Circuit held that specialty license plates implicated private speech, but that the specialty plate forum was only a non-public forum. The court then concluded that Illinois had decided to exclude the entire subject of abortion, and thus the denial of the plate was content-based but viewpoint neutral. "It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program," the court held. *Id.* at 855 (emphasis original).

Petitioners argue that the Seventh Circuit's holding means that Texas "can defend itself against a charge of 'viewpoint discrimination' if [it] has never issued or approved a license plate bearing a different viewpoint on the subject matter of the rejected license plate." Pet. at 2. Under the Seventh Circuit's rationale, Petitioners argue, there is no viewpoint discrimination under the present facts because Texas has not issued any plates pro- or anti- the Confederate flag. Pet. at 14-15. Petitioners urge this Court to hear this case based on an alleged circuit split between the Fifth Circuit's decision and *Choose Life Illinois*.

There is no circuit split between the Fifth Circuit and the Seventh Circuit because the rationale of *Choose Life Illinois* cannot apply to the facts of this case. First, the DMVB expressly rejected Texas SCV's plate because it was deemed "offensive," not because Texas was avoiding an issue raised by the Texas SCV plate. The DMVB's written denial says nothing about the State excluding an entire subject related to the

Texas SCV plate. Tellingly, Petitioners fail to point to any evidence in the record indicating that the State decided to exclude everything having to do with the Texas SCV or the Confederate flag. Nowhere in this record is there any evidence that the State has purposefully eschewed the entire "issue" raised by the Texas SCV plate, however that issue may be defined. The State's decision to avoid an entire issue, akin to Illinois's avoidance of the abortion debate, is simply absent from this record.

Second, the specialty plate program in Illinois required a separate legislative enactment for every specialty plate. *Choose Life Ill.*, 547 F.3d at 855. It did not involve the same specialty plate program at issue here, where individuals, non-profits, and businesses could design plates and apply to the DMV. Because the legislature in Illinois had to authorize each plate, there was an element of legislative discretion and control that is absent from the private parties' specialty plate program in Texas.

Third, most issues are not binary, including whatever issues are implicated by the Texas SCV plate. Thus, the Seventh Circuit's logic that the abortion debate can be neatly divided into two positions – pro-choice or pro-life – is simply inapplicable to the Confederate flag. How would one even define the viewpoints about the Confederate flag or the Sons of Confederate Veterans? Is someone pro-Southern heritage or anti-Southern heritage, pro-historical reenactments or anti-historical reenactments, pro-civil war monuments or anti-civil war monuments, or

even pro-racism and anti-racism? It is impossible to divide the issues raised by the Texas SCV plate into distinct categories that could be purposefully avoided by the State like abortion was in Illinois.

Finally, the Seventh Circuit itself noted in its opinion that if the case involved the Confederate flag, it would come out differently. The court noted, "Excluding the Confederate flag from a specialty-plate design [is a] fairly obvious instance[ ] of discrimination on account of viewpoint." *Id.* at 865. The Seventh Circuit recognized that the Confederate flag itself is a "viewpoint-specific symbol" and banning it is inherently viewpoint discrimination. *Id.* Thus, even if this case was decided by the Seventh Circuit, the Seventh Circuit would have reached the same conclusion as the Fifth Circuit.

II. THE FIFTH CIRCUIT DECISION IS SQUARELY IN LINE WITH SUPREME COURT PRECEDENT

Not only is there no circuit split applicable to the specific facts of this case, the Fifth Circuit's decision is also correct on the merits.

A. WHETHER SPEECH "MIGHT BE OFFENSIVE TO ANY MEMBER OF THE PUBLIC" IS NOT A CONSTITUTIONALLY VALID STANDARD TO LIMIT SPEECH

The DMVB denied Texas SCV's specialty plate application because it determined "that many members of the general public find the design offensive." App. 108, USCA5 322. It has long been an established rule of First Amendment law that speech cannot be curtailed simply because it may be offensive.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.

Snyder v. Phelps, 131 S. Ct. 1207, 1219-20 (2011) (alterations in original, internal quotations and citations omitted). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*,

502 U.S. 105, 118 (1991) (quotations omitted). "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder*, 131 S. Ct. at 1219 (internal quotation omitted).

Whether something "might be offensive to any member of the public" "is so nebulous and malleable [that it could mean] anything presently politically expedient." *See Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (alteration original, quotation omitted), *cert. denied sub nom Fischer v. Lewis*, 535 U.S. 986 (2002) (rejecting "contrary to public policy" and "inflammatory" standards under personalized license plate regulations as unconstitutional and ordering Missouri to reissue personalized plate to applicant) (internal quotation omitted). The history of this case proves that the "might be offensive to any member of the public" standard provides no objective guidance to speakers, gatekeepers, and courts to evaluate speech. Four different votes were taken by TxDOT and the DMVB, with widely different results.[9] The proposed

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[9] In October 2009, at the initial vote on the Texas SCV plate, three out of five of the members of the TxDOT specialty plate committee apparently determined that Texas SCV's plate was not offensive, and voted to approve the plate. App. 103, USCA5 280. In December 2009, TxDOT's same committee voted again and determined by a majority that the plate was offensive. *See* App. 106, USCA5 293. In a vote on April 14, 2011, four members of the DMVB concluded that the Texas SCV plate was not offensive, and four other members disagreed. App. 80, ¶ 17, USCA5 254. However, in the vote on November 10, 2011, all

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speech had not changed at all during this process, proving the "offensiveness" standard is completely subjective.

There is almost no speech that does not offend someone. Non-Christians and atheists could be offended by the "One State Under God" plate with its depiction of three crosses on Calvary Hill, or the "One Nation Under God" Knights of Columbus plate. There was some evidence in front of the DMVB that people were offended by the Buffalo Soldiers plate, but it was approved shortly after Texas SCV's was denied. App. 121, USCA5 451. There is no objective standard by which to determine if a proposed specialty plate is "offensive." Not even the committees in charge with enforcing the standard could consistently apply it.

The Constitution does not allow the State to censor unpopular viewpoints because the majority finds them "offensive." Such a standard allows for unbridled discretion and is a recipe for viewpoint discrimination.

B. THE SPECIALTY PLATES AT ISSUE ARE PRIVATE SPEECH

Nothing about specialty plates in general or this case in particular is truly that remarkable. Undoubtedly the State can engage in government speech, and

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eight attending members of DMVB concluded that the plate was offensive. App. 80, ¶ 20, USCA5 254; App. 119, USCA5 446.

when it is speaking for itself it can say what it wants and decline to say what it does not want to say. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 467, 467-68 (2009) ("A government entity has the right to speak for itself [I]t is entitled to say what it wishes, and to select the views that it wants to express.") (alteration in original, citations and internal quotation marks omitted). The government can be in favor of adoption over abortion, for example, and can condition government funding on supporting that view. *Rust v. Sullivan*, 500 U.S. 173 (1991). A state can pick and choose which monuments to display in a public park, and does not have to accept all monuments until no open space remains. *Pleasant Grove City, Utah*, 555 U.S. at 470. The cases outline a doctrine of government speech that resonates with common sense and practical realities. But the "government speech" cases did not overturn years of First Amendment precedent providing that when the government opens up a forum for private citizens to speak, such as the State did when it created the specialty plate program at issue, the government cannot distinguish among potential speakers based on the speakers' viewpoints. *See, e.g., Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Once it has opened a

limited forum the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum nor may it discriminate against speech on the basis of its viewpoint. ") (internal quotations and citations omitted).

The Fifth Circuit correctly determined that organizational specialty plates at issue here are private speech and not government speech. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (Court presumed that license plates implicated private speech and engaged in a First Amendment analysis to hold that New Hampshire could not force its citizens to bear the state motto on standard issue license plates); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization license plate program" was primarily private speech, and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner).

C. DENYING TEXAS SCV'S SPECIALTY PLATE WITH THE CONFEDERATE BATTLE FLAG WAS VIEWPOINT DISCRIMINATION

It is undeniable that the Confederate battle flag is a symbol which evokes passionate viewpoints, both in favor and in opposition. As a Georgia district court observed:

> [T]here is no consensus today, almost forty years after the [adoption of state flag containing the Confederate battle flag] by the [Georgia] General Assembly, on its meaning. There are citizens of all races who view the flag as a symbolic acknowledgement of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying principles of discrimination, segregation, white supremacy, and rebellion.

Coleman v. Miller, 912 F. Supp. 522, 530 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997). *See also Briggs v. Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003) ("It is common knowledge that public reaction to and the debate over the flying of the Confederate battle flag, or its being a part of a state flag, has been virtually exclusively in relation to its symbolism of the Confederacy and the valor of its troops and whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality."). The discussion that arises about the Confederate flag is exactly the sort of robust debate

that is protected by the First Amendment, and speakers in that debate cannot be discriminated against by the State on the basis of their viewpoint. *See Denno v. School Bd. of Volusia Cty.*, 218 F.3d 1267, 1285 (11th Cir. 2000) (J. Forrester, concurring and dissenting in part) ("The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect."). That there is controversy surrounding the Confederate flag shows that it is a symbol that should be a topic for open debate, without the government censoring one side or the other.

When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The State gave its imprimatur to the viewpoint that the Confederate battle flag was a symbol of racism, and discriminated against those who view the flag as a historic symbol of the soldier's sacrifice, independence, and Southern heritage. The DMVB's rejection of the Texas SCV plate constitutes impermissible viewpoint discrimination under the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Through the program at issue, the Texas Legislature authorized non-profit organizations to submit applications to the Texas Department of Motor Vehicles proposing designs for new specialty license plates. *See* Tex. Transp. Code § 504.801. Once an application is submitted, the Department acquires complete control over whether the organization's design will be approved. *See* 43 Tex. Admin. Code §§ 217.28(i)(7), .40. If the Department approves a design, it may be printed on state-issued license plates, assuming all other statutory and regulatory conditions are met. *See id.* § 217.28(i)(8). If

the Department declines to approve a design, it may not lawfully appear on any state-issued plate. *See ibid.*

As the court of appeals recognized, its conclusion that specialty license plates produced under this program constitute private speech, rather than government speech, puts it in conflict with the Sixth Circuit. App. 15a (declining to follow *ACLU v. Bredesen*, 441 F.3d 370, 375–77 (6th Cir. 2006), and stating that *Bredesen* "cannot be reconciled with . . . *Wooley* [*v. Maynard*, 430 U.S. 705 (1977)]"). Four other circuits agree with the court of appeals on this point, reflecting the recurring nature of First Amendment challenges to state specialty plate programs and the uncertainty about how such challenges should be analyzed. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Ariz. Life Coal. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). Respondents' efforts to downplay this conflict and portray it as inapplicable here fail, and their brief in opposition overlooks the complexities that arise, in the absence of guidance from this Court, when courts encounter speech containing elements of both private and governmental expression.

The Court should clarify the contours of the government-speech doctrine. This case is a good vehicle for doing so not only because litigation targeting specialty license plate programs is common and will continue to arise in the many States that have such programs, but also because the nature of the speech at issue allows for robust exploration of the doctrine.

1. As the Fourth Circuit noted more than a decade ago, "[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint-based distinctions, and when it is regulating private speech and thus unable to do so." *Sons of Confederate Veterans*, 288 F.3d at 618; *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 248 (4th Cir. 2002) (Niemeyer, J., dissenting from the denial of rehearing en banc) (observing that "[w]hether license-plate content is government speech has never been decided by our court, and the appropriate analysis is not clearly indicated by any Supreme Court precedent"). With respect to this Court's precedent, that statement remains true today, and the uncertainty renders suspect all of the circuit decisions on which the parties rely in this case.

a. Respondents are wrong that "[t]here is no circuit split applicable to these facts." Br. in Opp. 5. In response to the first question presented, respondents attempt to distinguish specialty plates authorized by state legislatures from specialty plates authorized by state agencies. *Id.* at 6, 9–11; *see id.* at 7 (asserting that, with respect to the second category of specialty plate, the courts of appeals agree that "private speech concerns [are implicated] and that government regulation must comply with the First Amendment").

That is a false dichotomy. When the question is whether a State or a private party is speaking, it does not matter whether the speech is authorized by a state legislature, a state agency, or a state official acting in his

or her official capacity. All three are equally governmental; respondents could not credibly assert that an official act of a state agency or a state official contains even a modicum of private expression. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality op.) (noting that, in determining whether a State has committed a taking, "the particular state *actor* is irrelevant"); *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) (observing that "[t]he Constitution does not impose on the States any particular plan for the distribution of governmental powers"). And to the extent respondents assert that programs such as the one at issue here are "established for private parties to design specialty plates," Br. in Opp. 11, they elide the essential ingredient of state approval.

Far from promoting unfettered private speech, these programs merely allow private parties to propose speech that may or may not be approved for dissemination by the State on pieces of state property. In that respect, they are no different from programs through which legislatures are spurred to authorize specialty plates proposed by the citizens they represent. *See Bredesen*, 441 F.3d at 376 (noting that, "[a]t least where Tennessee does not blatantly contradict itself in the messages it sends by approving [specialty license] plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval").

Accordingly, the conflict that petitioners identified between the Sixth Circuit and the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits, Pet. 1–2, 11–14, is

applicable here. The Court should grant the petition to resolve it.[1]

b. Respondents next attempt to diminish the uncertainty surrounding the government-speech doctrine by stating that "[t]he courts of appeals engage in a variety of linguistic formulations of the test to be applied to determine whether speech is 'private' or 'government.'" Br. in Opp. 8 n.6. But the cases they cite do not merely use different words to describe a single test; they highlight the absence of a definitive test and proceed down different analytical paths. *See, e.g.*, App. 11a (following *Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring in the judgment)); *Choose Life Ill.*, 547 F.3d at 863 ("distill[ing]" and "simplif[ying]" a multifactor test used in other circuits); *Bredesen*, 441 F.3d at 375–77 (following *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005)); *Sons of Confederate Veterans*, 288 F.3d at 618–19 (applying four factors that are

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[1] Respondents do not deny the existence of circuit conflict on whether specialty license plates "created by specific legislative enactment[s]" present government speech. Br. in Opp. 9. As just noted, state governments speak through their legislatures, agencies, and officials alike, so the distinction that respondents draw on this point is illusory. But even assuming otherwise, the petition for a writ of certiorari in *Berger v. ACLU of North Carolina*, No. 14-35 (arising from *ACLU of North Carolina v. Tata*, 742 F.3d 563, 568, 575 (4th Cir. 2014)), unquestionably implicates that conflict. *See* Br. in Opp. 9–11 (conceding that *Bredesen* and *Tata* are irreconcilable). At the very least, the Court should hold the petition in this case pending its disposition of *Berger*.

neither "exhaustive" nor "always[] applicable"). These decisions only bolster the need for further review.

Moreover, the "reasonable observer" test that the court of appeals applied in this case, App. 11a, and that other courts of appeals have applied in this context, *e.g.*, *Roach*, 560 F.3d at 867, is drawn from Justice Souter's opinion concurring in the judgment in *Summum*. *See* 555 U.S. at 487 ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige . . . ."). That courts of appeals are resorting to a single Justice's concurring opinion further underscores the need for guidance—particularly where the "reasonable observer" test is at best in tension with statements of a majority of this Court, *see* App. 29a (Smith, J., dissenting); Pet. 6–7, and the same jurist who proposed it later acknowledged that the government-speech doctrine remains in "an adolescent stage of imprecision." *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J., by designation).

c. The relevant uncertainty extends beyond mere lack of agreement about the applicable test. Another open question is what leeway a governmental actor has under the First Amendment if the speech in question is a mixture of private and government expression.

Like the dissenting opinion below, App. 29a n.1, the Fourth Circuit has concluded that specialty license plates present this type of amalgam. *E.g.*, *Tata*, 742 F.3d at 568, 575 (acknowledging that this Court has not embraced the concept of mixed speech but nevertheless holding that a

"'Choose Life' plate implicates private speech rights and [could not] correctly be characterized as pure government speech"); *see also Ariz. Life Coal.*, 515 F.3d at 960 (stating that "[m]essages conveyed through special organization plates—although possessing some characteristics of government speech—represent primarily private speech").

Accordingly, to the extent respondents identify a private component of the speech at issue here, that element of specialty license plates only provides an additional reason to grant the petition. As Judge Luttig suggested a dozen years ago, "speech that appears on the so-called 'special' or 'vanity' license plate could prove to be the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting the denial of rehearing en banc). The Court should accept Judge Luttig's tacit invitation to provide clarity on this point of law.[2]

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[2] Respondents' efforts to deny the existence of circuit conflict on the petition's second question, Br. in Opp. 11–14, likewise fail. Although the Seventh Circuit did identify exclusion of the confederate battle flag from a specialty plate design as an example of viewpoint discrimination, *Choose Life Ill.*, 547 F.3d at 865, there could be no question that, under the Fifth Circuit's sweeping understanding of that concept, the challenged action in *Choose Life Illinois* would be unconstitutional. *Compare* App. 22a–23a (stating that petitioners would be engaging in viewpoint discrimination if they "[s]ilenc[ed] both the view of [respondents] and the view of those members of the public who find the flag offensive"), *with Choose Life Ill.*, 547 F.3d at 865, 867 (holding that Illinois's "viewpoint neutral and reasonable" decision to deny *any* abortion-related specialty plate was permissible content discrimination).

2. It is undisputed that when the government speaks, the First Amendment does not restrict its expression. *Summum*, 555 U.S. at 467–68; *see* Br. in Opp. 17–18. For that reason, respondents' discussion of "established First Amendment law" regarding regulation of offensive speech, Br. in Opp. 15; *see id.* at 6, 16–17, 20–21, would be relevant only if the speech at issue here were private.

But because content printed on state-issued license plates approved by government officials is either purely or predominately government speech, the court of appeals erred in concluding that inapplicable concerns about viewpoint discrimination forced Texas to approve respondents' application for a specialty license plate featuring the confederate battle flag. *See Summum*, 555 U.S. at 470–71 (holding that "privately financed and donated monuments that the government accepts and displays to the public on government land" express government speech); *Johanns*, 544 U.S. at 562 (concluding that "[w]hen . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages").

Respondents' contention that *Wooley* supports their position on the merits, Br. in Opp. 19, is based on a misreading of the opinion. The question in *Wooley* was whether New Hampshire could compel citizens who opposed the State's "Live Free or Die" motto to display that motto on their vehicles' license plates. 430 U.S. at 707–08, 713. The Court's opinion explaining why the

State could not do so supports petitioners' argument in two respects.

First, *Wooley* confirms that a message approved by a State and printed on state-issued license plates is government speech. As the Court explained, "New Hampshire's statute in effect require[d] that [the vehicle owners] use their private property as a 'mobile billboard' for *the State's ideological message*." *Id.* at 715 (emphasis added); *see also id.* at 717 (observing that "[t]he State [wa]s seeking to communicate to others *an official view*" (emphasis added)).

Second, *Wooley* held that a State may not force its citizens to display a message with which they disagree. *Id.* at 717. A private entity should likewise not be able to force a State to print and disseminate messages it finds offensive. *See Sons of Confederate Veterans, Inc.*, 305 F.3d at 252 & n.4 (Gregory, J., dissenting from the denial of rehearing en banc) (observing that a State that does not want to print the confederate battle flag on its license plates "is in a position very similar to that of objecting drivers in *Wooley*" and that "even if the display of the Confederate flag is not considered 'pure' government speech, that there will be a perception of government endorsement of the Confederate flag is undeniable").

Respondents fail to mention, let alone contest, the untenable consequences of a conclusion that States do not enjoy the privilege that the Court recognized in *Wooley* and instead must maintain viewpoint neutrality when speaking through their specialty license plate programs. *See* Pet. 17–18. Regardless of whether messages on such plates are best viewed as government speech or

a mixture of private and government speech, embracing respondents' position would force any State that has authorized a "Stop Child Abuse" plate, for example, to authorize a "Legalize Child Abuse" plate as well.

But the First Amendment is prohibitory, not mandatory. It generally forbids governmental interference with private speech, but it does not require governmental support of private speech with which the government disagrees. *See Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (explaining that "[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism" (citation omitted)). The Court should grant the petition and hold that, although a State may generally not prohibit its citizens from offending one other, it cannot be forced by private parties to offend its citizens itself.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 2014

Supreme Court, U.S
FILED

DEC 31 2014

OFFICE OF THE CLERK

No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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Petition for writ of certiorari filed August 7, 2014
Certiorari granted December 5, 2014

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U.S. District Court [LIVE]
Western District of Texas (Austin)
CIVIL DOCKET FOR CASE #: 1:11-cv-01049-SS

Texas Division, Sons of Confederate Veterans, Inc. et al v. Victor T. Vandergriff et al
Assigned to: Judge Sam Sparks
Case in other court: 5th USCA, 13-50411
Cause: 42:1983 Civil Rights Act

Filing Date	#	Docket Text
12/8/2011	1	COMPLAINT * * * filed by Ray W James, Granvel J. Block, Texas Division, Sons of Confederate Veterans * * *
1/6/2012	7	MOTION to Dismiss by Clifford Butler, Blake Ingram, Cheryl Johnson, Raymond Palacios, Jr., Victor Rodriguez, Marvin Rush, Laura Ryan, Texas Department of Motor Vehicles Board, Victor T. Vandergriff, John Walker III. * * *
1/17/2012	10	AMENDED COMPLAINT * * * filed by Ray W James, Granvel J. Block, Texas Division, Sons of Confederate Veterans, Inc. * * *
1/17/2012	11	Response in Opposition to * * * MOTION to Dismiss * * *
1/30/2012	23	MOTION to Dismiss *Plaintiffs' First Amended Complaint* by Clifford Butler, Blake Ingram, Cheryl Johnson, Raymond Palacios,

		Jr., Victor Rodriguez, Marvin Rush, Laura Ryan, Victor T. Vandergriff, John Walker III. * * *
2/10/2012	25	Response in Opposition to * * * MOTION to Dismiss *Plaintiffs' First Amended Complaint* * * *
3/7/2012	27	ORDER DISMISSING AS MOOT [7] Motion to Dismiss ; DENYING [23] Motion to Dismiss. Signed by Judge Sam Sparks. * * *
3/21/2012	29	ANSWER to [10] Amended Complaint by Clifford Butler, Blake Ingram, Cheryl Johnson, Raymond Palacios, Jr., Victor Rodriguez, Marvin Rush, Laura Ryan, Victor T. Vandergriff, John Walker III. * * *
10/31/2012	35	MOTION for Summary Judgment *and, in the Alternative, for Preliminary Injunction* by Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc.. (Attachments: # (1) Appendix Appendix, # (2) Exhibit Exhibit 1, # (3) Exhibit Ex A, # (4) Exhibit Ex B, # (5) Exhibit Ex C, # (6) Exhibit Ex D, # (7) Exhibit Ex E, # (8) Exhibit Ex F, # (9) Exhibit Ex G, # (10) Exhibit Ex H, # (11) Exhibit Ex I, # (12) Exhibit Ex J,

		# (13) Exhibit Ex K, # (14) Exhibit Ex L) * * *
11/1/2012	37	MOTION for Summary Judgment by Clifford Butler, Blake Ingram, Raymond Palacios, Jr., Victor Rodriguez, Marvin Rush, Laura Ryan, Victor T. Vandergriff, John Walker III. (Attachments: # (1) Proposed Order, # (2) Appendix Exhibits 1 to 4, # (3) Appendix Exhibit 5, # (4) Appendix Exhibits 6 to 8) * * *
11/13/2012	38	Response in Opposition to * * * MOTION for Summary Judgment *and, in the Alternative, for Preliminary Injunction* filed by Plaintiff Ray W James, Plaintiff Granvel J. Block, Plaintiff Texas Division, Sons of Confederate Veterans, Inc. * * *
11/15/2012	39	Response in Opposition to * * * MOTION for Summary Judgment filed by Defendant Victor Rodriguez, Defendant Clifford Butler, Defendant Marvin Rush, Defendant Laura Ryan, Defendant John Walker III, Defendant Blake Ingram, Defendant Raymond Palacios, Jr., Defendant Victor T. Vandergriff * * *

2/8/2013	42	ORDER re * * * Status Conference. IT IS ORDERED that both sides shall have until February 14, 2013, to file any supplements to their pending motions for summary judgment. Signed by Judge Sam Sparks. * * *
2/14/2013	43	REPLY to Response to * * * MOTION for Summary Judgment filed by Defendant Victor Rodriguez, Defendant Clifford Butler, Defendant Marvin Rush, Defendant Laura Ryan, Defendant John Walker III, Defendant Blake Ingram, Defendant Raymond Palacios, Jr., Defendant Victor T. Vandergriff * * *
4/12/2013	44	ORDER DENYING [35] Motion for Summary Judgment *by Plaintiffs*; GRANTING [37] Motion for Summary Judgment *by Defendants*. Signed by Judge Sam Sparks. * * *
4/12/2013	45	JUDGMENT. Signed by Judge Sam Sparks. * * *
4/30/2013	46	Appeal of Final Judgment [44], [45] by Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc. * * *
4/30/2013		NOTICE OF APPEAL following [46] Notice of Appeal (E-Filed) by

		Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc. * * *
5/2/2013	47	AMENDED JUDGMENT. Signed by Judge Sam Sparks. * * *
5/2/2013	48	Amended Appeal of Final Judgment [44], [47] by Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc. * * *
5/2/2013		Amended NOTICE OF APPEAL following [48] * * * by Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc. * * *
5/10/2013	49	TRANSCRIPT REQUEST by Granvel J. Block, Ray W James, Texas Division, Sons of Confederate Veterans, Inc.: No transcripts needed. * * *

General Docket
United States Court of Appeals
for the 5th Circuit

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, a Texas Corporation; GRANVEL J. BLOCK, Individually; RAY W. JAMES, Individually,

Plaintiffs - Appellants

v.

VICTOR T. VANDERGRIFF, In His Official Capacity as Chairman of the Board; CLIFFORD BUTLER, In His Official Capacity as a Member of the Board; RAYMOND PALACIOS, JR., In His Official Capacity as a Member of the Board; LAURA RYAN, In Her Official Capacity as a Member of the Board; VICTOR RODRIGUEZ, In His Official Capacity as a Member of the Board; MARVIN RUSH, in his official capacity as a Member of the Board; JOHN WALKER, III, In His Official Capacity as a Member of the Board; BLAKE INGRAM, In His Official Capacity as a Member of the Board,

Defendants - Appellees

Date	Text
05/03/2013	CIVIL RIGHTS CASE docketed. * * *
05/03/2013	CASE CAPTION updated. Additional appeal filed. * * *

07/01/2013	APPELLANT'S BRIEF FILED * * *
07/31/2013	APPELLEE'S BRIEF FILED * * *
08/14/2013	APPELLANT'S REPLY BRIEF FILED * * *
11/06/2013	ORAL ARGUMENT HEARD before Judges Smith, Prado, Elrod. Arguing Person Information Updated for: John Robert McConnell arguing for Appellant Granvel J. Block, Appellant Ray W. James; Arguing Person Information Updated for: Jonathan F. Mitchell arguing for Appellee Clifford Butler, Appellee Blake Ingram, Appellee Raymond Palacios Jr., Appellee Victor Rodriguez, Appellee Marvin Rush, Appellee Laura Ryan, Appellee Victor T. Vandergriff * * *
07/14/2014	PUBLISHED OPINION FILED. [13-50411 Reversed and Remanded] Judge: JES , Judge: ECP , Judge: JWE * * *
07/14/2014	JUDGMENT ENTERED AND FILED. * * *
08/01/2014	MOTION filed by Appellees Mr. Clifford Butler, Mr. Blake Ingram, Mr. Raymond Palacios, Jr., Mr. Victor Rodriguez, Mr. Marvin Rush,

	Ms. Laura Ryan, Mr. Victor T. Vandergriff and Mr. John Walker, III to stay issuance of the mandate * * *
08/04/2014	RESPONSE/OPPOSITION filed by Mr. Granvel J. Block, Mr. Ray W. James and Texas Division, Sons of Confederate Veterans, Incorporated [7697377-1] to the motion to stay issuance of the mandate * * *
08/06/2014	COURT ORDER - appellees' motion for stay of the mandate pending petition for writ of certiorari is DENIED. * * *
08/06/2014	MANDATE ISSUED. * * *
08/12/2014	SUPREME COURT NOTICE that petition for writ of certiorari [7703874-2] was filed by Appellees Mr. Clifford Butler, Mr. Blake Ingram, Mr. Raymond Palacios, Jr., Mr. Victor Rodriguez, Mr. Marvin Rush, Ms. Laura Ryan, Mr. Victor T. Vandergriff and Mr. John Walker, III on 08/07/2014. * * *

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.; a Texas Corporation, GRANVEL J. BLOCK, individually, and RAY W. JAMES, individually Plaintiffs,	§	
v.	§	CIVIL CASE NO. 1:11-cv-01049
VICTOR T. VANDERGRIFF. in his official capacity as Chairman of the Motor Vehicle Board, CLIFFORD BUTLER, in his official capacity as a Member of the Board, RAYMOND PALACIOS, JR., in his official capacity as a Member of the Board, BLAKE INGRAM, in his official capacity as a Member of the Board, CHERYL JOHNSON, in her official capacity as a Member of the Board, LAURA RYAN, in her official capacity as a Member of the Board, VICTOR RODRIGUEZ, in his official capacity as a Member of the Board, MARVIN RUSH, in his official capacity as a Member of	§	

the Board, and JOHN	§
WALKER III, in his official	§
capacity as a Member of the	§
Board	§
Defendants.	§

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME Plaintiffs Texas Division, Sons of Confederate Veterans, Inc. ("Texas SCV"), Granvel J. Block, and Ray W. James complaining of the Texas Department of Motor Vehicles Board executive director and Board members, Victor T. Vandergriff, Clifford Butler, Raymond Palacios, Jr., Blake Ingram, Laura Ryan, Victor Rodriguez, Marvin Rush, and John Walker III, acting in their official capacity, and for cause of action would respectfully show this Court as follows:

I. Nature of the Action

1.1 This action is filed pursuant to 42 U.S.C. §1983 to vindicate the rights secured to the Texas SCV by the First and Fourteenth Amendments to the Constitution.

1.2 The Texas SCV is a non-profit organization that works diligently to preserve the memory and reputation of the Confederate soldiers, emphasizing the virtues of their fight for the preservation of liberty and freedom. The organization, through its local camps, provides a service to communities through preservation of monuments, flags, and other historical materials, as well as through educational activities and other civic activities. Like many other non-profit organizations in Texas, the Texas SCV sought from the State of Texas, through the Department Motor Vehicles Board, approval

of a specialty license plate, both to raise awareness of their endeavors and to raise additional money to fund their activities.

1.3 Defendants are members of the Texas Department of Motor Vehicles Board who were involved with the decision to reject the Texas SCV's application for a specialty plate on the basis that it is "offensive to any member of the public," thus abridging the organization's rights to freedom of speech under the Constitution.

1.4 Accordingly, the Texas SCV seeks appropriate injunctive relief, in the form of a preliminary injunction and, after trial, a mandatory permanent injunction, enjoining the Defendants to approve the Texas SCV's application for a specialty plate and implementing such a plate.

II. Parties

2.1 Plaintiff Sons of Confederate Veterans, Texas Division, Inc. is a Texas non-profit corporation. The members of SCV are descendants of those soldiers who fought in the armed forces of the Confederate States of America during the American Civil War.

2.2 Plaintiff Granvel J. Block is an individual who resides in Orange, Texas and is the Commander of the Texas Division of the Sons of Confederate Veterans.

2.3 Plaintiff Ray W. James is an individual who resides in College Station, Texas, and is the Past Commander of the Texas Division of the Sons of Confederate Veterans.

2.4 Defendant Victor T. Vandergriff is the current Chairman of the Board. Mr. Vandergriff is being sued

herein solely in his official capacity as the Chairman of the Board, and has been served and appeared.

2.5 Defendant Clifford Butler is a member of the Board. Mr. Butler is being sued herein solely in his official capacity as a member of the Board, , and has been served and appeared..

2.6 Defendant Raymond Palacios, Jr. is a member of the Board. Mr. Palacios is being sued herein solely in his official capacity as a member of the Board, and has been served and appeared.

2.7 Defendant Blake Ingram is a member of the Board. Mr. Ingram is being sued herein solely in his official capacity as a member of the Board, and has been served and appeared.

2.8 Defendant Laura Ryan is a member of the Board. Ms. Ryan is being sued herein solely in her official capacity as a member of the Board, and has been served and appeared.

2.9 Defendant Victor Rodriguez is a member of the Board. Mr. Rodriguez is being sued herein solely in his official capacity as a member of the Board, and has been served and appeared.

2.10 Defendant Marvin Rush is a member of the Board. Mr. Rush is being sued herein solely in his official capacity as a member of the Board and has been served and appeared.

2.11 Defendant John Walker III is a member of the Board. Mr. Walker is being sued herein solely in his official capacity as a member of the Board, and has been served and appeared.

III. Venue and Jurisdiction

3.1 Venue is proper in this Court pursuant to 28 U.S.C. §1391(b)(2), as a substantial part of the events or ommissions giving rise to the claim occurred in such judicial district. Additionally, venue is proper in this Court pursuant to 28.U.S.C. §1391(b)(1), where all Defendants reside. The residence of the Defendants, as public officials sued for their official acts and where they performed the acts at issue, is such judicial district.

3.2 The court has original jurisdiction over this matter pursuant to 28 U.S.C. §1331, as SCV's claims arise under the Constitution of the United States, specifically the First Amendment and the Fourteenth Amendment applying it to the states.

IV. Facts

A. General Background of the Organization and its Seal

4.1 Texas SCV is a division of a national organization, the Sons of Confederate Veterans ("SCV"), which is the oldest hereditary organization for male descendants of Confederate soldiers and was originally organized at Richmond, Virginia in 1896. The membership consists of descendants of Confederate veterans, including African-American members and Hispanic members, whose ancestors fought for the Confederacy.

4.2 The mission of the organization is "to defend the Confederate soldier's good name, be the guardian of his history, perpetuate the principles that he defended, and see that the true history of the South is presented to

future generations."[1] In doing so, the organization raises and donates money for the conservation and preservation of Confederate flags and records; identifies, preserves and marks the graves of Confederate veterans; preserves memorials to veterans and Confederate units; supports museums; preserves battlefields threatened by development; and educates children and adults about the life of the Confederate soldier.

4.3 The SCV serves as a historical, patriotic, and non-political organization dedicated to insuring that the history of the period from 1861-1865 is preserved. The SCV's constitution expressly provides that the "SCV shall be strictly patriotic, historical, educational, benevolent, non-political, non-racial and non-sectarian."

4.4 The structure of the national SCV is divided into states, and further into local "camps." The SCV has programs at the local, state, and national levels which offer a variety of activities: preservation work, marking Confederate soldier's graves, historical re-enactments, scholarly publications, and regular meetings to discuss the military and political history of the Civil War.

4.5 There are local camps of the SCV in thirty-seven states as well as in England, Scotland, Australia, Brazil, and Europe, reflecting the descendants of Confederate veterans who were both American-born and foreign-born soldiers.

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[1] Dr. Buddy Patterson, *A Brief History of the Sons of Confederate Veterans*, http://www.texasscv.org/scvHistory.php (quoting speech by Lt. Gen. Stephen D. Lee of the Confederate States Army addressing the Sons of Confederate Veterans in 1906).

4.6 The SCV is strongly protective of preserving the memory and reputation of the Confederate soldiers, including the motives for their sacrifice, emphasizing the virtues of their fight for the preservation of liberty and freedom.

4.7 Texas SCV camps participate in a varity of civic activities, such as the state Adopt-a-Highway Program, and the preservation, recognition, and creation of Confederate veteran monuments both at the county level and the state level.

4.8 The seal of the SCV contains the Battle Flag of the Confederate States of America, orginally from the Battle Flag of the Army of Northern Virginia, designed under General P.G.T. Beauregard in order to avoid confusion on the battlefield due to the striking similarities between the first national flag of the Confederacy and the flag of the Union.

4.9 The flag is square, rather than an oblong rectangle, covered by a blue saltire[2] with a thirteen white five-pointed stars to represent the states of the Confederacy.

4.10 Although this flag was not the national Confederate flag, it was the battle flag under which Confederate soldiers, including Texas soldiers, fought in multiple battles.

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[2] In fact, as discussed in The Confederate Battle Flag: America's Most Embattled Emblem by John M. Coski, one of the reasons for the use of the saltire, or St. Andrew's Cross, rather than an upright cross was that the designer, William Porcher Miles, the former chair of the Committee on the Flag and Seal, had received comments made by Southern Jews and Protestants about the overtly religious nature of the upright cross.

4.11 This battle flag was initially adopted by SCV's predecessor, the United Confederate Veterans, thus is also representative as a "soldier's flag."

4.12 As reflected in early issues of the SCV periodical *The Confederate Veteran*, the seal of the national organization, containing the square soldier's flag, has been in use by the organization since at least 1924.[3]

B. Specialty License Plates for Organizations

4.13 The State of Texas has in recent years developed a variety of ways to personalize license plates as a source of revenue for the State. These include "specialty plates" available to Texas drivers for an additional fee that specifically benefit charity and non-profit organizations.

4.14 There are a variety of these specialty plates currently available to Texas drivers, and including a wide variety of charitable and non-profit organizations, including "Ducks Unlimited", "Fight Terrorism", "Knights of Columbus", "Boy Scouts of America" and "Choose Life." Most of these plates bear the seal of that organization and a motto or the organization name.

4.15 The specialty license plates generally cost the driver $30 more than the normal registration fees annually, with $22 of that amount going to a state agency.

4.16 Often the state's portion of the money goes to a state agency related to the purpose of a given organization. Money from the Ducks Unlimited specialty plate "goes

---

[3] In 2002, United States Patent and Trademark office approved this seal as a trademarked corporate logo for the organization. The SCV sought to trademark this seal in order to assure that the seal would only be used with SCV approval.

to the Texas Parks and Wildlife Department to support Texas Ducks Unlimited efforts to conserve and restore wetlands and associated habitats for wildlife and provide societal benefits such as clean water, flood control, and groundwater recharge."[4]

4.17 In 2010 alone, the State of Texas has received approximately $16 million in specialty plate sales. The program has generated approximately $131 million through fiscal 2010 since its inception in the mid-1990s.

4.18 This program is not only lucrative for the state, but is also a useful money-making activity for charities and non-profit organizations. The top sellers in 2010 made hundreds of thousands of dollars for their organization: the "Animal Friendly" plate made $518,832, shared with animal-welfare groups across the state, the "State of the Arts" plate, for statewide arts programs, made $485,302, and the "Keep Texas Wild" plate for state wildlife conservation made $388,279.

4.19 Currently, the SCV has specialty automobile license plates available to vehicle drivers in Georgia, North Carolina, Alabama, Maryland, Mississippi, Louisiana, South Carolina, Tennessee, and Virginia.

C. Texas SCV Submits its Initial Application for a License

4.20 Texas SCV initially applied for a specialty license plate in Texas with the Department of Transportation, the proper agency at the time, in August 2009.

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[4] Available at: https://rts. texasonl ine.state. tx. us/NASApp/txdotrts/SpecialPlateOrderServ let?grpid=60&pltid=79

4.21 Particularly at the time the Texas SCV initially applied, they were interested in having a specialty plate in advance of the Civil War Sesquiscentennial, April 12, 2011. Having a plate before that event would allow for the organization to acquire additional funds prior the Sesquicentennial, providing for the organization to have the monetary means for additional events. Further, having a specialty plate at the time of the Sesquicentennial would have allowed for additonal plate sales with members and non-members interested in commemorating the historic events.

4.22 The Texas SCV properly submitted its application form for a plate, and included that the nominating state agency was the Texas General Land Office, and the nominating officer was Commissioner Jerry Patterson, who is also a member of the Texas SCV.

4.23 In its application, the Texas SCV noted that it intended to use the funds from the plate to "[s]upport the General Land Office's preservation of historical documents important to Texas; support the Texas Historical Commission's placement of monuments to Texas units across the South; and generally assist in carrying out our mission."

4.24 On December 21, 2009, the Texas SCV received a letter from Rebecca Davio, Director of the Vehicle Titles and Registration Division, denying the Texas SCV's application for a specialty license plate.

4.25 Following this denial, the Texas SCV made an open records request of the Department of Transportation.

4.26 From documents provided in response to this, the Texas SCV learned that the application had initially passed, based upon a simple majority of a quorum of the committee members on October 30, 2009. Initially five of the seven members voted, with a three to two vote in favor of approving the plate. This vote stood for over a month.

4.27 However, as emails among the committee members demonstrate, upon Ms. Davio's insistance that there be a re-vote based upon the "controversial" nature of the plate, the plate was denied as part of a 4 to 1 vote. This re-vote took place on December 10, 2009.

4.28 There appears to be no procedural basis for the committee ignoring the initial quorum vote.

4.29 Prior to the re-vote, on December 4, 2009, Ms. Davio sent an email to the Chairman of the newly-formed Department of Motor Vehicles Board, Mr. Vandergriff, explaining that they had received an application from the Texas SCV and were planning to re-vote, and further noted a lawsuit in Florida regarding a similar plate.

4.30 In 2009, the Texas Legislature amended the Transportation Code to provide that the Department of Motor Vehicles, rather than the Department of Transportation, was charged with issuing specialty license plates. The license plate function moved to the new Department of Motor Vehicles on November 1, 2009.

4.31 Further, the Legislature created a Department of Motor Vehicles Board and established some guidelines

for the specialty plates. *See* Acts 2009, 81st Leg., ch. 933, § 2G.01, eff. Sept. 1, 2009.

4.32 Specifically, under Section 504.801(c) of the Transportation Code:

> The department shall design each new specialty license plate in consultation with the sponsor, if any, that applied for creation of that specialty license plate. **The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public,** if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule. At the request of the sponsor, distribution of the license plate may be limited by the department. (emphasis added)

4.33 Since the Board has been charged with issuing specialty license plates, it has approved 89 of the specialty plates -- and rejected none. The Sons of the Confederate Veterans plate is the first, and only, to be rejected.

4.34 In October 27, 2010, the Texas SCV sought a reversal of the denial of their application from the Board.

4.35 The Board agreed to address the Texas SCV's application for a specialty plate and allow the full Board to decide.

4.36 The Texas SCV received notice on March 18, 2011 that their sample plate had been approved related to

visibility and other technical requirements. Public comment was invited, and the plate was placed on the agenda for the April 14, 2011 Board meeting.

4.37 The design of plate that was approved is attached herein as Exhibit A.

4.38 Prior to that meeting, the official on-line public comments resulted in approximately 300 votes for the plate and only 6 against the plate. Thus, the official public comments were heavily in favor of the Texas SCV's application for a specialty plate.

4.39 At the April 14, 2011 meeting, the Board, missing one member, voted twice, with both votes resulting in a deadlock of 4-4.

4.40 The Board decided to move the vote of the Texas SCV plate to another meeting to address the deadlock.

4.41 The Texas SCV plate, sponsored by Commissioner Patterson, was not placed on the Board meeting agenda until November 10, 2011.[5]

4.42 Also on the Board meeting agenda, and also sponsored by Commissioner Patterson, was a license plate to honor the Buffalo Soldiers, post-Civil War black soldiers who fought in the Indian wars of the Southwest, and benefitting the Buffalo Soldiers National Museum in Houston.

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[5] One of the Board members who had voted for the Texas SCV plate passed away following the April 14, 2011 meeting. Governor Perry appointed a new member to the Board. This contributed to the delay of the vote for the Texas SCV plate.

4.43 Following commentary by both proponents and opponents, the Board rejected the SCV plate at the hearing by a 8-0 vote without any discussion.

4.44 At the same hearing, the Buffalo Soldiers plate, without any discussion, was approved by a 5-3 vote.

4.45 During the November 10, 2011 hearing, Chairman Vandergriff announced at the open hearing that the Board was denying the Texas SCV plate, and he referenced Section 504.801(c) of the Transportation Code, in which the "department may refuse to create a new specialty license plate if the design might be offensive to any member of the public."

4.46 On December 1, 2011, Randy Elliston, the Director of the Vehicle Titles and Registration Division of the Texas Department of Motor Vehicles, sent a letter to Plaintiff Ray W. James explaining that the "Texas Department of Motor Vehicles agency review and Board action regarding the application for creation of a Sons of Confederate Veterans specialty license plate [had] been completed" and that the Board, "after hearing public testimony, voted to deny the Son's of Confederate Veterans' application for a new specialty plate."

4.47 At some point in time, Chairman Vandergriff signed a Resolution Denying the Sons of Confederate Veterans Specialty Plate Application citing Transportation Code §504.801(c) and Title 43, Texas Administrative Code §217.28(c)(3). The Resolution states that the Board "finds it necessary to deny this plate design application ... because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." Further,

the Resolution states that "[t]he Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups." The Resolution also stated that the plate might pose a public safety issue due to the controversy.

4.48 The Texas SCV alone was denied its specialty license plate because of the seal of their organization contains a Confederate flag. This seal represents their viewpoint the viewpoint venerating the Confederate soldier and his cause, the preservation of liberty and freedom.

V. Cause of Action

5.1 Plaintiffs hereby reaffirm and re-allege each and every allegation made in contained in paragraphs 4.1-4.48 above.

5.2 Through the members of the Department of Motor Vehicles Board, the State of Texas has discriminated against the Texas SCV based on the ideas and message that the Texas SCV supports, in clear violation of the First Amendment.

5.3 The Board members seek to bar the Texas SCV from expressing their viewpoint while allowing all other groups to express their viewpoint: this type of restriction is exactly the type which the First Amendment is designed to erase.

5.4 The only guideline that the Transportation Code has to offer, which the Board referenced as its reason for rejecting the plate, is that the Board can reject a plate "if

the design might be offensive to any member of the public..."

5.5 This, however, cannot be the standard. It is vague and indeterminable. Essentially, it is no standard at all to say that the Board can discriminate based upon a viewpoint if such speech is offensive to anyone. The First Amendment clearly protects controversial speech.

5.6 Additionally, even if simply being "offensive to any member of the public" was sufficient to allow for rejection, the State has approved numerous plates that are "offensive to any member of the public" - such as the "Texas State Rifle Association" plate. In fact, the plate approved the very same day as the Texas SCV plate was rejected the Buffalo Soldier plate is offensive to Native Americans because the all-black cavalry helped fight Native Americans in the Indian Wars from 1867-1888.[6]

5.7 Similarly, the Board members denying the Texas SCV seal because it is "derogatory" is a violation of the First Amendment. The definition in Tex. Admin. Code §217.28(c)(3) is vague and is not objective: it puts the meaning of "derogatory" in the eye of the beholder. The Board members have determined the seal is derogatory, even though Plaintiffs, who are not an organization of hatred, believe the flag symbolizes the Confederate soldier and his cause.

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[6] *See* Gary Scharrer, *Indian group objects to Buffalo Soldier plates*, HOUSTON CHRONICLE, available at http://www.chron.com/news/houston-texas/article/Indian-group-takes-issue-with-Buffalo-Soldier-22931-28. php.

5.8 The Board members have also stated in the Resolution that public safety might be an issue, but there is no support for that statement. Further, the same concern could be raised of many of the other plates already issued, including those for colleges and professional sports teams.

5.9 In order to protect their rights, Plaintiffs file this suit against Defendants for preliminary and mandatory permanent injunctive relief pursuant to 42 U.S.C. §1983.

5.10 All conditions precedent to the bringing of this action have either occurred or been performed by Plaintiffs or waived by Defendant.

5.11 The Texas SCV is entitled to a preliminary injunction and, following trial, a mandatory permanent injunction against the Defendants to compel them to grant the Texas SCV's application for a specialty plate and to implement such a plate.

5.12 Plaintiffs can demonstrate that they have suffered an irreparable injury. The Fifth Circuit has stated that [l]oss of First Amendment freedoms, even for minimal periods of time, constitute irreparable injury." *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir.1994). Further, Plaintiffs had applied to receive their plate in time for the sesquicentennial of the Civil War, which began in April 2011, which offered a boost in sales of the plate. Plaintiffs are being denied their plate during an important time for their organization.

5.13 Plaintiffs have no adequate remedy at law. The Defendants are denying the Plaintiffs plate based upon the very seal of the organization. Plaintiffs have no other

means to have their plate implemented by the state with their seal other than to enjoin the Defendants to do so.

5.14 Plaintiffs have a likelihood of success on the merits. There is ample caselaw that specialty plates are private speech and thus viewpoint discrimination, such as what occurred here, is not permitted under the First Amendment.

5.15 The balance of hardships favor the Plaintiffs. Plaintiffs are deeply affected by the denial of their specialty plate, both by the infringement on their right to speak through these plates and by the loss of revenue for activities that they support. Particularly in light of the many, many specialty plates already in existence and regularly approved by the Defendants, the Defendants will suffer no injury.

5.16 Injunctive relief would not adversely affect public policy or public interest. Indeed, the promotion of First Amendment rights, such as free speech, is important public policy and of significant public interest.

5.17 The Texas SCV has retained the undersigned counsel to prosecute this action and has agreed to pay counsel a reasonable attorney's fee for the efforts herein. Defendants are liable for this fee as well as their costs under Section 1988 of Title 42 of the United States Code.

WHERFORE Plaintiffs Texas Division, Sons of Confederate Veterans, Inc., request this Court:

- grant the Plaintiffs' requested injunctive relief, enjoining the Defendants to approve the Texas SCV's application for a specialty plate and implementing such a plate;

- grant to Plaintiffs their resonable and necessary attorneys' fees and costs;
- and for such further relief to which Plaintiffs are entitled.

Respectfully submitted,

GEORGE & BROTHERS, L.L.P.
By: /s/
R. James George, Jr.
Texas State Bar No. 07810000
1100 Norwood Tcrwer
114 W. 7th Street
Austin, Texas 78701
Telephone: (512) 495-1400
Facsimile: (512) 499-0094
rjgeorge@georgecandbrothers.com

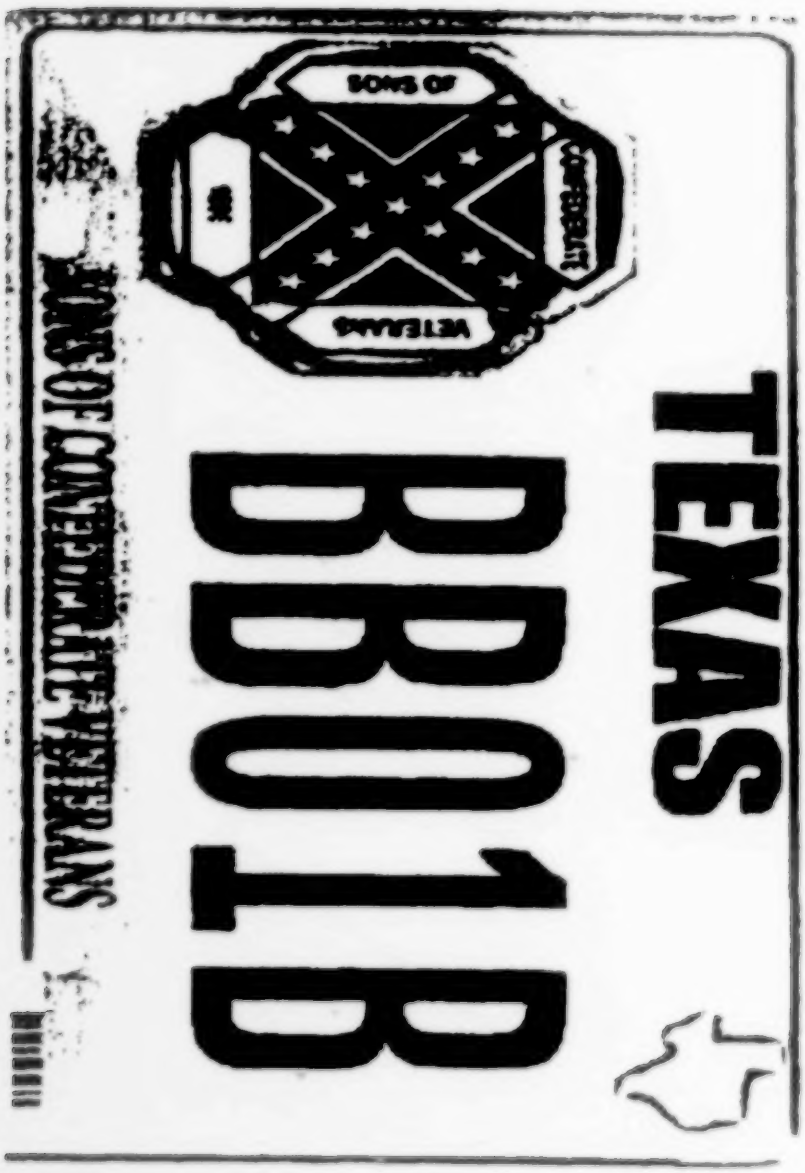
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on the 17th of January 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF electronic filing system, which will send notification of such filing to the following:

Erika M. Kane
James "Beau" Eccles
Assistant Attorneys General
Office of the Attorney General
General Litigation Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

/s/
R. James George, Jr.


TEXAS
BB01B
SONS OF CONFEDERATE VETERANS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., a Texas Corporation, GRANVEL J. BLOCK, individually, and RAY W. JAMES, individually *Plaintiffs*,	§	
v.	§	
VICTOR T. VANDERGRIFF, in his official capacity as Chairman of the Motor Vehicle Board, CLIFFORD BUTLER, in his official capacity as a Member of the Board, RAYMOND PALACIOS, JR., in his official capacity as a Member of the Board, BLAKE INGRAM, in his official capacity as a Member of the Board, CHERYL JOHNSON, in her official capacity as a Member of the Board, LAURA RYAN, in her official capacity as a Member of the Board, VICTOR T. RODRIGUES, in his official capacity as a Member of the Board,	§	CIVIL CASE NO. 1:11-cv-01049-SS

MARVIN RUSH, in his official capacity as a Member of the Board, and JOHN WALKER, III, in his official capacity as a Member of the Board,	§ § § § § § § §
Defendants.	§

DEFENDANTS' ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE SAM SPARKS:

Defendants, Victor T. Vandergriff, in his official capacity as Chairman of the Texas Department of Motor Vehicles (DMV) Board ("the Board"), Clifford Butler, in his official capacity as a member of the Board, Raymond Palacios, Jr., in his official capacity as a member of the Board, Blake Ingram, in his official capacity as a member of the Board, Cheryl Johnson, in her official capacity as a member of the Board, Laura Ryan, in his official capacity as a member of the Board, Victor Rodriguez, in his official capacity as a member of the Board, Marvin Rush, in his official capacity as a member of the Board, and John Walker III, in his official capacity as a member of the Board (collectively, "Defendants") file this Answer in response to Plaintiffs' First Amended Complaint, and respectfully show the Court the following:

Pursuant to FED. R. CIV P. 8(b), Defendants deny each and every allegation contained in Plaintiffs' First Amended Complaint except for those expressly admitted herein. The numbered paragraphs and titles below

correspond to the numbered paragraphs and titles within Plaintiffs' Complaint:

I. Nature of the Action

1.1 This paragraph contains assertions of law to which no response is required.

1.2 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

1.3 Admit that Defendants are members of the DMV Board and that the DMV Board denied a plate design application filed by the Texas Sons of Confederate Veterans (SCV); deny remainder of paragraph.

1.4 This paragraph contains a restatement of Plaintiffs' claim for relief to which no response is required.

II. Parties

2.1 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

2.2 Admit.

2.3 Admit.

2.4 Admit.

2.5 Admit.

2.6 Admit.

2.7 Admit.

2.8 Admit.

2.9 Admit.

2.10 Admit.

2.11. Admit.

III. Venue and Jurisdiction

3.1. Admit.

3.2 Defendants admit that as a general matter the Court has federal question jurisdiction over Plaintiffs' claims, but deny that any violation of law has occurred.

3.3. Admit.

IV. Facts

A. General Background of the Organization and its Seal

4.1 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.2 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.3 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.4 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.5 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.6 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.7 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.8 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.9 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.10 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.11 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

4.12 Defendants are without sufficient information to admit or deny Plaintiffs' allegations, and therefore deny same.

B. Specialty License Plates for Organization

4.13 Admit.

4.14. Admit first sentence. Deny second sentence.

4.15 Admit.

4.16 Admit.

4.17 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.18 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.19 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

C. Texas SCV Submits its initial Application for License

4.20 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.21 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.22 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.23 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.24 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.25 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.26 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.27 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.28 Defendants are without sufficient information to admit or deny Plaintiffs' allegation and therefore deny same.

4.29 Admit Defendant Vandergriff received an e-mail from Ms. Davio; deny remainder of paragraph.

4.30 Admit.

4.31 Admit Legislature established the DMV; deny remainder of paragraph.

4.32 Admit that the language cited is language in the statute.

4.33 Deny.

4.34 Admit.

4.35 Admit that DMV Board considered SCV's plate design application at a meeting subsequent to October 2010.

4.36 Admit SCV's plate design was an April 14, 2011 agenda item and that as a general matter public comment is permitted on specialty plate designs pursuant to 43 Tex. Admin. Code § 217.28(i)(6). Deny remainder of paragraph.

4.37. Deny.

4.38 Deny.

4.39 Admit.

4.40 Admit.

4.41 Admit.

4.42 Admit that the Buffalo Soldiers license plate design was a November 10, 2011 agenda item.

4.43 Admit.

4.45 Deny.

4.46 Admit.

4.47 Admit the Board issued a resolution signed by Chairman Vandergriff; the language of the resolution speaks for itself.

4.48 Deny.

V. Cause of Action

5.1 No response is required to this paragraph.

5.2 Deny.

5.3 Deny.

5.4 Deny.

5.5 Deny.

5.6 Deny.

5.7 Deny.

5.8 Deny.

5.9 Deny that Plaintiffs are entitled to the requested relief.

5.10 This paragraph contains legal argument to which no response is required.

5.11 Deny.

5.12 Deny.

5.13. Deny.

5.14 Deny.

5.15 Deny.

5.16 Deny.

5.17 Admit that Plaintiffs have retained counsel, but deny that Defendants are liable for fees and costs.

Defendants deny that Plaintiffs are entitled to any of the relief requested in their prayer for relief.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for
Defense Litigation

ROBERT B. O'KEEFE
Chief, General Litigation Division

/s/ Erika M. Kane
Erika M. Kane
Texas Bar No. 24050850
Assistant Attorney General
General Litigation Division
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Phone (512) 463-2120
Fax (512) 320-0667
COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been sent via the Court's electronic notification system on March 21, 2012, to:

R. James George, Jr.
George & Brothers, LLP
114 West 7th Street
Suite 1100
Austin, TX 78701
(512) 495-1400 (phone)
(512) 499-0094 (fax)

/s/ Erika M. Kane
Erika M. Kane
Assistant Attorney General

IN THE UNITED SATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., a Texas corporation, GRANVEL J. BLOCK, Individually, and RAY W. JAMES, individually	§	
Plaintiffs,	§	
v.	§	CIVIL CASE
TEXAS DEPARTMENT OF MOTOR VEHICLE BOARD, VICTOR T. VANDERGRIFF, in his official capacity as Chairman of the Board, CLIFFORD BUTLER, in his official capacity as a Member of the Board, RAYMOND PALACIOS, JR., in his official capacity as a Member of the Board, BLAKE INGRAM, in his official capacity as a Member of the Board, CHERYL JOHNSON, in her official capacity as a Member of the Board, LAURA RYAN, in her official capacity as a Member of the Board, VICTOR RODRIGUEZ, in his official capacity as a Member of the	§	NO. 1: 11-cv-01049

Board, MARVIN RUSH,	§
in his official capacity as a	§
Member of the Board, and	§
JOHN WALKER III, in his	§
Official capacity as a Member	§
of the Board	§
	§
Defendants.	§

AFFIDAVIT OF RAY W. JAMES

STATE OF TEXAS	§
	§
COUNTY OF /s/ Brazos	§

BEFORE ME, the undersigned Notary Public, on this day personally appeared Ray James, whose identity is known to me. After being by me duly sworn, on his oath, he said:

1. My name is Ray W. James. I am over the age of eighteen (18), of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated, which are all true and correct.

2. I am the Past Commander of the Texas Division of Sons of Confederate Veterans ("Texas SCV"). I was the Commander at the time of Texas SCV's application for a specialty license plate.

EXHIBIT
1

3. Currently, the SCV has specialty automobile license plates available to drivers in Georgia, North Carolina, Alabama, Maryland, Mississippi, Louisiana, South Carolina, Tennessee, and Virginia. Each of these plates features the SCV logo. Photographs of these plates are attached as **Exhibit A**.

4. Texas SCV initially applied for a specialty license plate in Texas with the Department of Transportation (TxDOT), the proper agency at the time, in August 2009. The plate was sponsored by Texas Land Commissioner Jerry Patterson. A true and correct copy of the application is attached as **Exhibit B**.

5. The proposed specialty license plate included the logo or seal of the Sons of the Confederate Veterans, which contains the Battle Flag of the Confederate States of America encircled by four tabs containing the words "Sons of Confederate Veterans 1896."

6. The logo of the SCV contains the Battle Flag of the Confederate States of America, originally from the Battle Flag of the Army of Northern Virginia, designed under General P.G.T. Beauregard in order to avoid confusion on the battlefield due to the striking similarities between the First National flag of the Confederacy and the flag of the Union.

7. The flag is square and covered by a blue saltire with thirteen white five-pointed stars to represent the states of the Confederacy. Although the battle flag design was adopted as the canton in both the Second National and Third National flags of the Confederacy, the battle flag was not the national Confederate flag; it was the battle flag under which Confederate soldiers,

including Texas soldiers, fought in multiple battles. This battle flag was initially adopted by the SCV's predecessor, the United Confederate Veterans, as their symbol. Thus it best represents the soldiers who fought under it and has been referred to as the "soldier's flag".

8. As reflected in early issues of the SCV periodical *The Confederate Veteran* (a true and correct copy of which is attached as **Exhibit C**), the seal of the national organization, containing the square soldier's flag, has been in use by the organization since at least 1924. There is no other official logo, seal, or emblem that represents the SCV. To be sure, some divisions have at times embellished the logo with additional graphic elements such as sabers or a wreath, but the essential SCV logo has remained the same since at least 1924, with the square Battle Flag and the four tabs containing the words "Sons of Confederate Veterans 1896."

9. In 2003, the logo was registered with United States Patent and Trademark Office as a service mark for the Sons of Confederate Veterans. The SCV sought to trademark this seal in order to assure that the seal would only be used with SCV approval.

10. Particularly at the time we initially applied, we were interested in having a specialty plate in advance of the Civil War Sesquiscentennial, April 12, 2011. Having a plate before that event would allow for Texas SCV to acquire additional funds prior the Sesquicentennial, providing for the organization to have the monetary means for additional events. Further, having a specialty plate at the time of the Sesquicentennial would have allowed for additional plate sales with members and non-

members interested in commemorating the historic events. Texas SCV's annual budget is only about $10,000, and we estimated the sale of the specialty plates would have tripled our budget.

11. In its application, we noted that we intended to use the funds from the plate to "[s]upport the General Land Office's preservation of historical documents important to Texas; support the Texas Historical Commission's placement of monuments to Texas units across the South; and generally assist in carrying out our mission."

12. On October 1, 2009, the Texas SCV (through the undersigned) received an email from the Texas Department of Transportation acknowledging receipt of Texas SCV's application for the specialty plate. The email noted that the application was reviewed and deemed complete. The email also stated:

> The review process is automated. The application and all pertinent information is scanned and placed on a secured TxDOT Intranet site for the SPLAC members to review and anonymously vote on the application. Rebecca Davio, Vehicle Titles and Registration Division Director, sends an E-mail to all SLPAC members advising the application is ready for their review and vote. She usually allows 5 business days for the SLPAC members to review and vote.
>
> I intermittently check the site to review the voting. Once a simple majority quorum vote is complete, you will be advised if the SLPAC

> tentatively approved or denied the specialty license plate application.

A true and correct copy of this email is attached as **Exhibit D.** (Attorney-client privileged notations have been redacted.)

13. More than two months later, in a letter dated December 21, 2009, Rebecca Davio, Director of the Vehicle Titles and Registration Division, informed us that our application for a specialty license plate was denied. A true and correct copy of this letter is attached as **Exhibit E.**

14. Following this denial, the Texas SCV made an open records request to the Department of Transportation. **Exhibit F** contains true and correct excerpts from the response to the open records request,

15. In October 2010, after learning that the TxDOT Board had initially approved the plate, we appealed to the Texas DMV, the agency that acquired the responsibility for approving specialty license plates. A true and correct copy of the appeal to the Texas DMV is attached as **Exhibit G.**

16. We received notice on March 18, 2011 that our sample plate had been approved related to visibility and other technical requirements. The design of plate that was approved is attached herein as **Exhibit H.**

17. Public comment was invited, and the plate was placed on the agenda for the April 14, 2011 Board meeting. At the April 14, 2011 meeting, which I attended, the Board voted twice, with both votes resulting in a deadlock of 4-4 (one member of the 9-person board was

absent). The Board decided to move the vote of the Texas SCV plate to another meeting to address the deadlock.

18. Our plate was not placed on the Board meeting agenda again until November 10, 2011.

19. Also on the November 10, 2011 Board meeting agenda, and also sponsored by Commissioner Patterson, was a license plate to honor the Buffalo Soldiers, post-Civil War black soldiers who fought in the Indian wars of the Southwest, and benefitting the Buffalo Soldiers National Museum in Houston.

20. Following commentary by both proponents and opponents, the Board rejected the Texas SCV plate at the November 10, 2011 hearing by a unanimous vote.

21. At the same hearing, the Buffalo Soldiers plate was approved by a 5-3 vote.

22. The Texas Department of Motor Vehicles Board members who voted on the decision to reject our plate were: Victor T. Vandergriff, the executive director, and members Clifford Butler, Raymond Palacios, Jr., Blake Ingram, Laura Ryan, Victor Rodriguez, Marvin Rush, and John Walker III.

23. During the November 10, 2011 hearing, Chairman Vandergriff announced that the Board was denying the Texas SCV plate, and he referenced Section 504.801(c) of the Transportation Code, in which the "department may refuse to create a new specialty license plate if the design might be offensive to any member of the public." (77:5-7.) True and correct copies of excerpts from the transcript of the Nov. 10, 2011 hearing are

attached as **Exhibit I.** (The full transcript is available online at http://www.txdmv.gov/About_Us/board_meetings/2011/transcripts/nov10.pdf. Last visited October 3, 2012.)

24. The Texas Department of Motor Vehicles Board set forth the reasons for its Nov. 10, 2011, rejection of the proposed Sons of Confederate Veterans plate design in a Resolution signed by the Board Chair, a true and correct copy of which is attached as **Exhibit J.**

25. I have reviewed the website myplates.com which sells specialized plates for Texas. There are a variety of these specialty plates currently available to Texas drivers, and including a wide variety of charitable and non-profit organizations, including "Ducks Unlimited", "Fight Terrorism", "Knights of Columbus", "Boy Scouts of America" and "Choose Life." Other specialty plates available in Texas include plates referencing or depicting Mighty Fine Burgers, Knights of Columbus (which reads "One Nation Under God"), the Dallas Cowboys, Calvary Hill and three crosses (which reads "One State Under God"), Remax Realty, and Keller High School Indians, to name a few. Examples of some of the plates available are attached as **Exhibit K.** Many of these plates bear the seal of an organization and a motto or the organization name. Current examples of specialty plates can be found on the DMV website at http://www.txdmv.gov/vehicles/ licenseplates/catalogplates.htm.

26. TxDOT offers for sale a "Flags of Texas" print that includes the flag of the Confederate States. It is available online at https://www.texashighways.com/txhwy/giftshoplindex.php?SCREEN=department&departme

nt=14&startpos=5 (last visited October 29, 2012). Attached as **Exhibit L** is a copy of the print.

27. The Texas SCV is a non-profit organization that works diligently to preserve the memory and reputation of the Confederate soldiers, emphasizing the virtues of their fight for the preservation of liberty and freedom. The organization, through its local camps, provides a service to communities through preservation of monuments, flags, and other historical materials, as well as through educational activities and other civic activities.

28. Texas SCV and the national Sons of Confederate Veterans condemn the misuse of the Confederate Battle Flag image by groups that espouse political extremism and/or racial superiority/divisiveness. These groups do not have any ownership over the right to use the Confederate Battle Flag. The Sons of Confederate Veterans, descendants of those soldiers who fought under the Confederate Battle Flag, are the flag's true inheritors.

FURTHER AFFIANT SAYETH NOT

/s/ Ray W. James
RAY W. JAMES

SUBSCRIBED AND SWORN TO BEFORE ME on /s/ 30th of October, 2012.

/s/ Kay S. Choate
NOTARY PUBLIC,
State of Texas

KAY S. CHOATE
MY COMMISSION EXPIRES
February 8, 2014

My commission expires: /s/ 2/8/14

(1/22/2010) Mike Craig – Re: SLPAC Votes – Sons of Confederate Veterans Page 1

REDACTED

From: Scott Renouard
To: Mike Craig; Rebecca Davio; Tammy Belk
CC: Christina Flores; David Chambers; Jennifer Soldano; Monica Hernandez
Date: 11/3/2009 8:52 AM
Subject: Re: SLPAC Votes – Sons of Confederate Veterans

Rebecca,

I would recommend you send an email encouraging all to vote (we did this once before)! Since it is now documented that we had a quorum and that the plate passed by a simple majority, I don't think we can just declare a no pass. An open records request would expose the vote and we will be shown as biased. I believe we should follow the procedures and let the public decide! Might even generate a lot hits to website! Thanks!
Scott

Scott Renouard
Director of Support Services
Vehicle Titles and Registration Division
Texas Department of Motor Vehicles
PO Box 26417
Austin, TX 78755-0417
512/302-2224
FAX: 512/302-2092
krenoua@dot.state.tx.us

==========

>>> Rebecca Davio 11/2/2009 6:11 PM>>>
Might thought is this plate did not pass the vote, so no further action is required except to notify the organization that they can try the legislative route.

>>>Tammy Belk 11/2/2009 4:27 PM>>>
As of 4:25 p.m. today nothing has changed regarding the votes for the Sons of Confederate Veterans.

Only 5 of 7 members have voted on this license plate; looks like we need all 7 to vote on this one.

Rebecca, what is the next step?

Thanks much!

Tammy Belk
Specialty License Plate Coordinator
Special Services Branch, VTR
TX Department of Motor Vehicles (TxDMV)
4000 Jackson Avenue
Austin, Texas 78731
512/302-2375
FAX 512/302-2040
tbelk@dot.state.tx.us

>>>

From: Tammy Belk
To: Mike Craig; Rebecca Davio
CC: Christina Flores; David Chambers; Monica Hernandez; Scott Renouard
Date: 10/30/2009 11:54 AM
Subject: SLPAC Votes - Sons of Confederate Veterans

As of 11:55 a.m. today:

Sons of Confederate Veterans
5 votes total
3 yes
2 no

I will continue to check on the Sons of Confederate Veterans. Thanks.

From: Tammy Belk
To: David Chambers; Jennifer Soldano; Mike Craig; Rebecca Davio; Scott R...
CC: Candace Southerland; Christina Flores
Date: 12/9/2009 3:40 PM
Subject: Sons of Confederate Veterans Vote

As of 3:35 p.m. today, Wednesday, December 9, 2009, vote is as follows:

1 - yes
3 - no

Thanks much!

Tammy Belk
Specialty License Plate Coordinator
Special Services Branch, VTR
TX Department of Motor Vehicles (TxDMV)
4000 Jackson Avenue
Austin, Texas 78731
512/302-2375
FAX 512/302-2040
tbelk@dmv.state.tx.us

>>>

From: Rebecca Davio
To: Tammy Belk, David Chambers, Jennifer Soldano, Scott Renouard, Mike Craig
CC: Christina Flores, Candace Southerland
Date: 12/7/2009 3:50 PM
Subject: Re: Sons of Confederate Veterans Vote

We need to send another reminder/plea.

This message is sent from a mobile device. Please excuse typos. Thanks–Rebecca

----Original Message----

From: Tammy Belk

Cc: Christina Flores <CFLORE2@dmv.state.tx.us>

Cc: Candace Southerland <CSOUTH1@dmv.state.tx.us>

To: David Chambers <DCHAMBE@dmv.state.tx.us>

To: Jennifer Soldano <JSOLDANO@dmv.state.tx.us>

To: Scott Renouard <KRENOUA@dmv.state.tx.us>

To: Mike Craig <MCRAIG1@dmv.state.tx.us>

To: Rebecca Davio <RDAVIO@dmv.state.tx.us>

Sent: 12/7/2009 1:46:34 PM
Subject: Sons of Confederate Veterans Vote

As of 1:42 p.m. today, Monday, December 7, 2009, only three members have voted.

1 vote yes
2 votes no

Rebecca sent E-mail requesting to re-vote on Thursday, December 3, 2009, at 11:45 a.m.

First vote was on 12/03/09, at 12:15 p.m.
Second vote on 12/02/09, at 1:07 p.m.
Third vote on 12/03/09, at 1:14 p.m.

No more votes since Thursday afternoon, December 3, 2009.

Thanks much!

Tammy Belk
Specialty License Plate Coordinator
Special Services Branch, VTR
TX Department of Motor Vehicles (TxDMV)
4000 Jackson Avenue
Austin, Texas 78731
512/302-2375
FAX 512/302-2040
tbelk@dmv.state.tx.us

TEXAS DEPARTMENT OF MOTOR VEHICLES
BOARD MEETING

9:00 a.m.
Thursday,
November 10, 2011

Room 120
John H. Reagan Building
105 West 15th Street
Austin, Texas 78701

BOARD MEMBERS:

Victor Vandergriff, Chair
Cheryl E. Johnson, Vice Chair
Cliff Butler
Blake Ingram
Raymond Palacios
Victor Rodriguez
Marvin Rush
Laura Ryan
Johnny Walker

STAFF MEMBERS:

Linda M. Flores, Interim Executive Director
Brett Bray, General Counsel

EXHIBIT
I

[76] MR. VANDERGRIFF: Thank you.
That concludes the public comments, and thank you very much for your time on that. I do want to note for the benefit of the audience, and certainly my fellow board members are aware of this, that typically when plates come before us, when we were created, the decision was made by the legislature to have this board hear plates versus being decided, in essence in secret, for or against by the staff of the Texas Department of Transportation. And in fact, there is a history with this plate at that department that it might have actually been approved by the department versus coming before this board.
One of the great things about this board, that's been noted by several of the speakers, is that it is available to the public and to the industries so that all matters are aired in public. And I think that's one of the great things that we've seen today is that this has not been something decided in secret, it's been decided in open with comments both for and against this -- or will be decided.
I want to note that typically when we get plates before us, because the decision also was made by

the legislature that we wanted to encourage private plates so that we could generate additional revenue for the state. We have had a proliferation of those plates, if [77] you will, over the last two years to accomplish that very task. Most of the time we base our decisions on rules that primarily deal with reflectivity and readability.

We do, however, always look at Transportation Code Section 504.801(c) which is that the department may refuse plates if the design is offensive to any member of the public, the nominating state agency does not consent to the receipt of funds derived from the issuance of the license plate, the uses identified from those funds might violate a statute or constitutional provision, or for any other reason established by rule which, again, most of our rules today deal with reflectivity, readability and proliferation of the plate. So I wanted to note that for the record that these are the things the board will consider, I'm sure, as it makes a decision.

With that, I'm happy to open this up to my board members.

MR. RODRIGUEZ: I move we not approve items 5.A.1 and 2, Mr. Chairman.

MR. VANDERGRIFF: Do we have a second

for that
motion?
MR. PALACIOS: Second.
MR. VANDERGRIFF: We have a motion from Board
Member Rodriguez, a second from Board Member Palacios. Do
we have any discussion?
[78] MR. INGRAM: Is the motion to deny number 1 and
2?
MR. VANDERGRIFF: No. The motion is to deny
just the –
MR. INGRAM: His motion was 1 and 2.
MR. VANDERGRIFF: 1 and 2?
MR. RODRIGUEZ: 1 and 2, yes, sir.
MR. VANDERGRIFF: Your motion was to deny 1 and
2?
MR. RODRIGUEZ: Yes, sir. We're considering
both at this time. Right? Are we not considering both?
MR. VANDERGRIFF: The way we brought it up, it
was just the Sons of Confederate Veterans.
MR. RODRIGUEZ: All right. Let me modify my
motion then. I move that we not approve item 5.A.1.
MR. VANDERGRIFF: Do we have a second for that?
MR. PALACIOS: Second.

MR. VANDERGRIFF: We have a motion and a second. Do we have any discussion by the board?

(No response.)

MR. VANDERGRIFF: Seeing none, I will call for your vote. A yes vote is a motion to deny. All those in favor of denying the plate, please raise your right hand.

(A show of hands.)

MR. VANDERGRIFF: All those opposed?

[79] (No response.)

MR. VANDERGRIFF: The motion carries unanimously, the plate is denied.

(Applause and cheering from audience.)

MR. VANDERGRIFF: We do have other business to attend to. Given the fact that the room is a little crowded, we're going to stand in recess for 15 minutes.

MR. VANDERGRIFF: The Board of the Texas Department of Motor Vehicles, we are back in session.

We're going to take up where we left off which, again, was out of the order of the posted agenda, but that is on 5.A.2 which is the Buffalo Soldiers plate. I'm not sure if Commissioner Patterson is still here in the room to speak for this plate. I think he had given his thoughts previously on it, so I will acknowledge that he

is the head of the sponsoring state agency.
We do have three speakers here in favor of this plate that I do want to recognize. The first is founder of the Buffalo Soldiers National Museum, Paul Matthews.
CAPT. MATTHEWS: Good morning. This is a marvelous day that the Lord sent, show a little enthusiasm. Good morning.
AUDIENCE: Good morning.
CAPT. MATTHEWS: That's more like it. My name is Captain Matthews. I'm the founder and the curator of

[194] CERTIFICATE

MEETING OF: Texas Department of Motor Vehicles Board
LOCATION: Austin, Texas
DATE: November 10, 2011

I do hereby certify that the foregoing pages, numbers 1 through 194, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Nancy H. King before the Department of Motor Vehicles.

11/20/2011
(Transcriber) (Date)

On the Record Reporting
3307 Northland, Suite 315
Austin, Texas 78731

BOARD OF THE TEXAS DEPARTMENT OF MOTOR VEHICLES

RESOLUTION DENYING SONS OF THE CONFEDERATE VETERANS SPECIALTY LICENSE PLATE APPLICATION

Transportation Code, Chapter 504, Subchapter I provides for the development of new specialty license plates through the department.

The Texas Department of Motor Vehicles Board is responsible for approving or declining all specialty license plate applications under Transportation Code §504.801 and in accordance with Title 43, Texas Administrative Code, §217.28, Specialty License Plates, Symbols, Tabs, and Other Devices.

The Board finds that the Sons of the Confederate Veterans specialty plate design was posted on the Internet for public comment, and notice of consideration of the plate design was posted in accordance with Office of the Secretary of State meeting notice requirements in accordance with §217.28(i)(6).

Order Number:_____

Date Passed:
/s/ November 10, 2011

EXHIBIT
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The Board decision is based on: compliance with Transportation Code, §504.801; whether the design meets legibility and reflectivity standards; whether the design meets the standards for uniqueness; whether the license plate design can accommodate the International Symbol of Access (ISA); whether the objectionable or misleading criteria designated in §217.22(c)(3)(B) applies to the design; whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; other information provided during the application process, including public comment on proposed design; and information provided in open meeting.

Transportation Code, §504.801(c) authorizes the Board to refuse to create a new specialty license plate if the design might be offensive to any member of the public or for any other reason established by rule. The provision of Title 43, Texas Administrative Code, §217.28(c)(3) lists factors under which a license plate may be considered objectionable or misleading. The objectionable factors include, but are not limited to whether the plate is found to be derogatory. "Derogatory" is defined as an expression of hate directed toward people or groups that is demeaning to people or groups, or associated with an organization that advocates such expressions.

The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board

finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

The Board also finds there is a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue. The department shares a common public mission with several state agencies to protect public safety. The extent of the controversy surrounding this plate may challenge public safety since the design could distract or disturb some drivers to the point of being unreasonably dangerous.

IT IS THEREFORE ORDERED by the Board that the Sons of the Confederate Veterans specialty plate design is disapproved.

The department is directed to take the necessary steps to implement the actions.

/s/
Victor Vandergriff, Chairman
Board of Texas Department of Motor Vehicles

Examples of Specialty License Plates Available in Texas

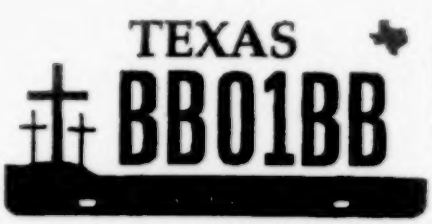
[Fold-Out 1 to be inserted here]

Examples of Specialty License Plates Available in Texas

Statutory Plate

Statutory Plate

Non-profit Application-Based Plate



Non-profit Application-Based Plate

Commercial Application-Based Plate

Commercial Application-Based Plate

EXHIBIT
K

Examples of Specialty License Plates Available in Texas

[Fold-Out 1 to be inserted here]

TEXAS
BB01B
God Bless Texas

TEXAS
BB01B
TEXAS MASONS

TEXAS
BB01B

TEXAS
BB01B
SCOUTING TEACHES VALUES

TEXAS
BB01B
SERVICE ABOVE SELF

TEXAS
BB01B
Choose Life

AFA
TEXAS
BB01B
AIR FORCE ASSOCIATION

UF
TEXAS
BB01BB
The Gator Nation

TEXAS
BB01B
God Bless America

TEXAS
BB01B
TEXAS 4-H
To Make the Best Better

Texas DMV Brochure:
"Proposing a Specialty License Plate"

[Fold-Out 2 to be inserted here]

There are now 3 ways to get your specialty license plate on the road.

1 Submit your proposal to myplates.com

posing a design to My Plates, the department's cial vendor for new specialty license plates, is an easy / for anyone to propose a new license plate. My Plates he vendor contracted by the Texas Department of Motor icles (TxDMV) to create, market, and sell new license te designs, and may be the first stop for any group, for- fit or non-profit, to request a plate. License plates sold ough My Plates can benefit your organization by sending it ortion of the plate's proceeds. This process requires you ubmit a $4,615 deposit to My Plates, which is refunded if are a non-profit organization, after 500 of your plates are l or renewed.

Who's eligible?

Any individual, non-profit organization, or for-profit entity can propose a new specialty license plate to My Plates.

Who gets the revenue?

Plate sales benefit the State, My Plates, and your organization. Your proceeds from your plate's sales can go virtually anywhere--even directly to your organization. The proceeds your organization receives from the sale of specialty plates submitted through My Plates are set by your contractual agreement with My Plates, not by law.

Do I need to find a state sponsor?

No. With My Plates you do not have to find a sponsor.

How long does the process take?

From the time the proposal is made, the approval process typically takes about six months before the plate is available to order.

What are the plate design requirements?

License plates proposed through My Plates must meet legibility, reflectivity, and design standards. However, license plates created using this method allows you a larger variety of design options, like having your plate created in full color.

For more information about how to propose a license plate design to My Plates, visit www.myplates.com.

2 Submit your proposal to the Texas Department of Motor Vehicles

The Texas Department of Motor Vehicles (TxDMV) can administratively approve new license plate designs that benefit state agencies or charities. Your qualifying non-profit organization must complete the department's application and, if it is approved, submit an $8,000 deposit, which will be refunded when 800 sets of your organization's license plates are sold or renewed. A representative from your organization must complete TxDMV's license plate sponsorship application, which includes information about your organization and proof that your organization qualifies as a non-profit organization with the Internal Revenue Service.

Who's eligible?

Only non-profit organizations may apply to create a license plate through TxDMV. Nominating organizations must reach an agreement with a qualifying state organization or TxDMV.

Who gets the revenue?

If your license plate is approved, your state agency sponsor will receive $22 of the $30 fee collected for every set of specialty plates sold.

Your organization can work with its state agency sponsor to determine where proceeds can be sent.

Do I need to find a state sponsor?

Yes. If your organization does not find a state agency willing to sponsor your license plate and accept the proceeds from its sale, the proceeds are distributed to the highway fund.

How long does the process take?

From the time the proposal is made, the approval process typically takes about six months before the plate is available to order.

What are the plate design requirements?

License plates proposed through TxDMV must meet legibility, reflectivity, and design standards. An online design template is available at the TxDMV website to assist you.

For more information about TxDMV's license plate approval process, visit www.TxDMV.gov.

3 Ask Your State Legislator

The Texas Legislature also has the ability to create new license plates and is the sole option for plates offered at reduced or no fee to qualified applicants (e.g. military). Because of the volume of legislative requests for new specialty license plates previously filed during each legislative session, the legislature specifically granted TxDMV and My Plates the ability to create new plates without legislative intervention. Except for plates honoring our military, a legislatively created license plate requires the sponsor to submit an $8,000 deposit to the TxDMV which is refunded after 800 plates are sold or renewed.

Who's eligible?

Anyone can approach their legislator and ask for a new license plate design. However, new license plates created through this process tend to be for the benefit of state agencies, or to recognize service, such as military.

Who gets the revenue?

The fee amount and distribution of revenue is set by the legislature.

Do I need to find a state sponsor?

Maybe. License plates created by the legislature typically benefit state agencies.

How long does the process take?

The time it takes to have a license plate legislatively approved varies. It takes approximately six months after the bill becomes law before the plate is available to order.

What are the plate design requirements?

License plates created by the Texas Legislature must meet legibility, reflectivity, and design standards.

To contact your legislator, find out who represents you by visiting www.fyi.legis.state.tx.us.

67.b

Texas DMV Brochure:
"Proposing a Specialty License Plate"

[Fold-Out 2 to be inserted here]

Frequently Asked Questions

Q. My organization isn't a certified non-profit agency. Are we still eligible to sponsor a license plate?
A. Yes. Anyone—including individuals, non-profit organizations, and for-profit entities—can propose a design to My Plates, the state's official vendor for specialty license plates.

Q. Why do we have to submit a deposit?
A. The $8,000 deposit for plates created through the TxDMV process covers the state's costs for programming, and producing your organization's license plate. Your deposit will be refunded when 800 sets of your organization's specialty license plates are sold or renewed. License plates created through My Plates require a $4,615 deposit, which is refunded to non-profit organizations after 500 of your specialty license plates are sold or renewed.

Q. If my organization doesn't sell 800 or more license plates after going through the TxDMV approval process, where does our deposit go?
A. Your deposit remains in the State Highway Fund until sales of your license plate meet the statutory threshold of 800 renewals or new applications.

Q. Can my organization's specialty plate be available only to individuals that meet certain criteria?
A. Yes. For example, the department currently offers a license plate for which only licensed Realtors® are entitled. However, remember that adding qualifications will restrict the number of potential purchasers, and could result in keeping your organization from meeting its refund threshold.

Q. Does my organization have to reapply if our proposal is not approved, or will it be reconsidered?
A. Your organization must reapply.

Q. Who provides the plate design?
A. You do, though your design is subject to reflectivity, legibility, and design standards. Depending on which approval route you choose, My Plates or TxDMV will work with your organization to help you understand those standards.

Q. How much money does a sponsoring state agency receive from the sale of a plate sold through TxDMV?
A. Of the $30 fee collected for each specialty plate approved through the TxDMV and sold in the state of Texas, $22 goes to the sponsoring state agency.

Q. Is it possible to request that funds received from license plate sales benefit the applying non-profit organization?
A. Yes, this is possible if your proposal goes through My Plates. This is also possible for plates approved administratively or legislatively.

Q. Is the TxDMV, or My Plates, under an obligation to produce my specialty license plate design?
A. No. New plates are either approved by the TxDMV Board or by the Texas Legislature.

The Texas Department of Motor Vehicles offers a number of license plates specifically for military veterans, military medal honorees, and their families. Because these qualifying license plates are issued under a military-specific fee structure, new military-related license plates must be proposed and approved through the legislative process.
Persons wishing to create a license plate honoring members of the military should use this table as a guide when proposing the plate's fee structure.

Congressional Medal of Honor	Free	Free*	Free
Legion of Valor Air Force Cross Distinguished Service Cross Navy Cross	Free	Free*	Free
Distinguished Flying Cross	Free	Free*	Free
Distinguished Service Medal	Free	Free*	Free
Silver Star	Free	Free*	Free
Bronze Star, Bronze Star w/ Valor	Free	Free*	Free
Legion of Merit	Free	Free*	Free
Disabled Veteran	3.00	Free*	6.00
Former POW (Prisoner of War)	3.00	Free*	6.00
Pearl Harbor Survivor	3.00	Free*	6.00
Purple Heart	3.00	Free*	6.00
World War II, Korea, Vietnam, Operations Iraqi Freedom, Enduring Freedom, and Desert Storm**	Free*	Free*	6.00
Active or Honorably Discharged US Air Force US Army US Coast Guard US Marine Corps US Navy	Free*	Free*	6.00
Coast Guard Auxiliary	Free*	Free*	6.00
Armed Forces Reserve	Free*	Free*	6.00
Military Academy Graduates US Air Force Academy US Military Academy West Point US Naval Academy	Free*	Free*	6.00
US Paralympian	Free*	Free*	6.00
Woman Veteran	Free*	Free*	6.00
Marine Corps League	Free*	Free*	6.00
Texas Guard (National or State)	Free*	Free*	6.00
Texas Wing Civil Air Patrol	Free*	Free*	6.00
Gold Star Family	10.00*	N/A	6.00
Gold Star Father	10.00*	N/A	6.00
Gold Star Mother	10.00*	N/A	6.00
Gold Star Spouse	10.00*	N/A	6.00

* requires payment of regular registration fees.
** Desert Storm also qualifies for this plate

www.TxDMV.gov
Rev. 06/12
DHTR 196017

Texas Department *of* Motor Vehicles
HELPING TEXANS GO. HELPING TEXAS GROW.

Proposing a Specialty License Plate

Supreme Court, U.S.
FILED
DEC 31 2014
OFFICE OF THE CLERK

No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

GREG ABBOTT
Attorney General of Texas

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First Assistant Attorney General

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JONATHAN F. MITCHELL
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Counsel of Record

BILL DAVIS
ARTHUR C. D'ANDREA
EVAN S. GREENE
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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

PARTIES TO THE PROCEEDING

Petitioners John Walker III; Victor Vandergriff; Clifford Butler; Raymond Palacios, Jr.; Laura Ryan; Victor Rodriguez; Marvin Rush; and Blake Ingram were Defendants-Appellees in the court of appeals.[1]

Respondents Texas Division, Sons of Confederate Veterans, Inc.; Granvel J. Block; and Ray W. James were Plaintiffs-Appellants in the court of appeals.

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[1] Pursuant to Supreme Court Rule 35, the petitioners note that John Walker III; Victor Vandergriff; Clifford Butler; Raymond Palacios, Jr.; Laura Ryan; Victor Rodriguez; Marvin Rush; and Blake Ingram were sued in their capacities as public officials. Victor Vandergriff and Clifford Butler no longer hold office. They have been replaced by Joseph Slovacek and Robert Barnwell III. John Walker III replaced Victor Vandergriff as Chairman of the Board.

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In the Supreme Court of the United States

No. 14-144

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

The respondents want this Court to order Texas to issue a license plate adorned with the confederate battle flag. But neither the Speech Clause nor this Court's cases permit that result. The State of Texas, no less than a private individual, has the right to select the messages and viewpoints that it will promote and convey. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). And Texas is not willing to propagate the confederate battle flag by etching that image onto state-issued license plates that bear the State's name.

There is nothing unconstitutional about the State's decision. No one contends that the Speech Clause imposes a freestanding obligation on States to issue license

plates featuring the confederate battle flag upon request. Rather, the respondents contend that Texas can no longer exclude the confederate battle flag from its license plates because it has begun placing state-approved and state-supported messages on *other* license plates issued to the public.

The respondents are mistaken. The speech that appears on state-issued license plates is government speech, and the Speech Clause allows a State to select the messages, symbols, and viewpoints that it is willing to publicly support. That remains the case even when private individuals propose license-plate designs for the State to accept or reject, *see Summum*, 555 U.S. at 470–71, and even when the State enlists private motorists to assist the State in conveying its state-approved messages, *see Rust v. Sullivan*, 500 U.S. 173, 192–95 (1991). And there is no requirement that a State maintain "viewpoint neutrality" in selecting the speech that it will display on state-issued license plates. The District of Columbia's license plates include the phrase "Taxation Without Representation"; the Speech Clause does not require the district to begin offering license plates with messages that praise the district's lack of voting representation in Congress. A State that issues "Fight Terrorism" specialty plates is not required to offer specialty plates with messages that praise al Qaeda. The respondents are not seeking to vindicate their freedom of speech; they are trying to coerce the State of Texas into propagating a message and image that it does not wish to convey.

OPINIONS BELOW

The opinion of the court of appeals is available at 759 F.3d 388. Pet. App. 1a–50a. The district court's opinion, which upheld the State's decision to exclude the confederate battle flag from its license plates, is available at 2013 WL 1562758. Pet. App. 53a–112a.

JURISDICTION

The court of appeals entered its judgment on July 14, 2014. *Id.* at 51a–52a. The petition for writ of certiorari was filed on August 7, 2014, and granted on December 5, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

None of the parties has argued that the Tax Injunction Act bars this lawsuit, but the court of appeals considered the issue on its own initiative. Pet. App. 6a–7a. The court of appeals correctly held that the Tax Injunction Act presents no obstacle because the respondents are not seeking a remedy that would "enjoin," "suspend," or "restrain" the collection of any tax. 28 U.S.C. § 1341.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to the petition for writ of certiorari. Pet. App. 115a–190a.

STATEMENT

1. The State of Texas requires state-issued license plates to be displayed on all registered motor vehicles. *See* Tex. Transp. Code § 504.943; 43 Tex. Admin. Code § 217.22. For many years, the State offered only a single

style of license plate. But Texas now manufactures a variety of license-plate designs and offers choices to the drivers who must display state-issued license plates.

Drivers who choose to pay the normal vehicle-registration fee receive a plain-vanilla license plate with the State's name and nickname ("The Lone Star State"), along with a randomly generated sequence of numbers and letters. *See* Texas Department of Motor Vehicles, License Plates, http://bit.ly/1twt98g ("As part of your vehicle registration you are issued a set of general-issue license plates. The plate number is assigned to you by the TxDMV [and] cannot be personalized.") (last visited Dec. 30, 2014). But drivers willing to pay an extra fee can receive a "specialty" plate containing a specialized design or message. *See* Tex. Transp. Code § 504.008. Sales of these specialty plates generate revenue for state agencies as well as charitable and nonprofit organizations that the State deems worthy of support. *See id.* § 504.801.

There are different ways by which a specialty-plate design can become part of the State's license-plate repertoire. Some plates are specifically authorized by the Texas legislature. *See id.* §§ 504.601, .602–662. Texas also permits the Department of Motor Vehicles Board to design new specialty plates, either on its own initiative or in response to an application from a nonprofit organization. *See id.* § 504.801. Finally, Texas sells plates though a private vendor, License Plates of Texas, LLC, dba My-Plates.com, which designs specialty plates and offers them to the public. *See id.* § 504.6011(a). Regardless of who designs or proposes a specialty plate, the Board

must approve every license-plate design before it can be offered to the public. *See* 43 Tex. Admin. Code §§ 217.28(i)(7), .40.

2. In 2009, the Sons of Confederate Veterans proposed a specialty-plate design featuring the Sons of Confederate Veterans' logo. J.A. 17. The logo consists of a square confederate battle flag surrounded on its four sides by the words "Sons of Confederate Veterans 1896"; the flag and its surrounding words are encapsulated together in an octagon. Pet. App. 191a (image of the proposed license-plate design); J.A. 29 (same).

3. In 2010, the Board invited public comments and placed the proposal on the agenda for its meeting of April 14, 2011. Pet. App. 67a. At that meeting, one board member was absent and the remaining eight deadlocked on whether to approve the plate. *Ibid.* The plate was reconsidered at the Board's meeting of November 10, 2011. *Ibid.* By the time of the November meeting, the Board's website had received hundreds of public comments opposing the plate, and the Board received letters of opposition from nineteen state representatives as well as the mayor of Houston. *Ibid.* Opponents of the plate also appeared at the Board's November meeting, and the Board heard strong objections from elected officials, members of the clergy, and leaders of the NAACP

State Senator Royce West, for instance, asked: "[W]hy should we as Texans want to be reminded of a legalized system of involuntary servitude, dehumanization, rape, mass murder?" Record 399. And State Senator Rodney Ellis noted that "[t]he Confederate battle flag has become a symbol of repression and violence, not

heritage[;] it provokes feelings of fear and intimidation amongst far too many Texans." *Id.* at 406; *see also id.* at 408 (B.J. Williams from the Garland branch of the NAACP stating: "The Rebel flag represents the darkest and the most dehumanizing period for African-Americans in the history of the United States. Public display of this symbol of hate, human servitude will add to and intensify an already toxic and viral political as well as social climate in our great nation and state."). Speakers also noted that Governor Rick Perry and Republican state Senator John Carona publicly opposed the respondents' license-plate proposal. *Id.* at 400, 406.

After hearing this testimony, the Board voted unanimously against issuing the plate, explaining in its order that

> [t]he Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate[s] the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.

Pet. App. 69a.

4. The Sons of Confederate Veterans sued, accusing the Board of violating the Speech Clause by rejecting its proposed license-plate design. J.A. 23. The State re-

sponded that the government-speech doctrine allows a State to choose the messages and symbols that will appear on its specialty license plates, and that in all events the Board's decision to reject the Sons of Confederate Veterans' license-plate proposal was not unconstitutional viewpoint discrimination. *See* Pet. App. 9a, 18a.

5. The district court rejected the State's first argument, concluding that the State's specialty plates were a "nonpublic forum" in which the State must refrain from "viewpoint discrimination." *Id.* at 78a–92a. But the court agreed with the State's second argument, holding that the Board did not engage in viewpoint discrimination by refusing to issue the respondents' proposed license plate. *Id.* at 92a–103a. The district court therefore rejected the respondents' constitutional claims and entered judgment for the State. *Id.* at 114a.

6. a. The court of appeals (over dissent) reversed the district court's judgment. The panel majority first held that the messages and symbols on state-issued specialty license plates are "private speech," not government speech. The State had argued that *Summum* and *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), establish that a State's "final approval authority" and "effective[] control[]" over a proposed message makes the approved message government speech—even if it was designed or proposed by private entities. *Summum*, 555 U.S. at 472–73; *see also Johanns*, 544 U.S. at 561 ("[T]he Secretary exercises final approval authority over every word used in every promotional campaign.").

The panel majority, however, concluded that *Summum* "did not base its holding on [the] City's control

over the permanent monuments," but rather "focused on the nature of both permanent monuments and public parks." Pet. App. 10a–11a. As for *Johanns*, the majority said only that "*Summum* ... shows that 'the Supreme Court did not espouse a myopic "control test" in *Johanns*.'" *Id.* at 27a (quoting *ACLU of N.C. v. Tata*, 742 F.3d 563, 570 (4th Cir. 2014)).

The majority also held that the appropriate "test" for government speech comes from Justice Souter's opinion concurring in the judgment in *Summum*: "whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige." *Id.* at 11a (*quoting Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). The majority then declared that "the differences between permanent monuments in public parks and specialty license plates on the back[s] of personal vehicles convince us that a reasonable observer would understand that the specialty license plates are private speech." *Id.* at 11a–12a.

The court of appeals further held that the State engaged in impermissible "viewpoint discrimination" by rejecting the respondents' license-plate proposal. *Id.* at 24a. The State had argued that its decision to keep the confederate battle flag off its license plates was viewpoint-neutral because the State has not issued any license plate disparaging the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. *See id.* at 18a. Although the court of appeals did not deny that the State has never approved a license plate that espouses any point of view on the con-

federacy or the confederate battle flag, it concluded that "there is nothing in the Board's decision that suggests it *would* exclude all points of view on the Confederate flag." *Id.* at 22a (emphasis added).

The panel majority also declared that "even if the Board were correct that its decision merely excluded multiple viewpoints on the meaning of the Confederate flag, that decision would be equally objectionable." *Ibid.* In the court of appeals' view, *any* decision to reject a specialty license plate "based on the speaker's message" constitutes viewpoint discrimination. *Id.* at 23a ("[T]he state engaged in viewpoint discrimination when it denied a specialty license plate based on the speaker's message."); *ibid.* ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment.").

b. Judge Smith dissented on the government-speech issue. *Id.* at 25a. He first rejected the "reasonable observer test" that the panel majority used to distinguish government speech from private speech. In Judge Smith's view, "the 'reasonable observer' test demonstrably contradicts binding caselaw" (*Summum* and *Johanns*). *Id.* at 28a. Judge Smith also criticized the panel majority for "morph[ing] Justice Souter's lone concurrence [in *Summum*] (and his dissent in [*Johanns*]) into law." *Id.* at 27a; *see also id.* at 29a ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). Finally, Judge Smith argued that Texas's license plate program was analogous to the situation in

Summum and rejected the majority's efforts to distinguish that case. *Id.* at 29a.

c. The panel majority did not acknowledge or address several of the State's most important arguments. First, the State had argued that a "no viewpoint discrimination" rule would be untenable in the context of a specialty-license-plate program because it would mean that States that issue "Fight Terrorism" specialty plates would become constitutionally compelled to offer license plates expressing support for terrorism or terrorist organizations. Many other specialty plates in Texas unabashedly promote certain viewpoints at the expense of others, such as "Stop Child Abuse," "Mothers Against Drunk Driving," "Animal Friendly," and "Insure Texas Kids." The majority opinion did not explain how its "no viewpoint discrimination" rule could allow Texas to continue issuing these specialty plates without also offering plates that promote child abuse, drunk driving, animal cruelty, and messages opposing the State Children's Health Insurance Program.

Second, the State had argued that *Rust* allows States to control the messages and symbols that are used within the scope of a government program. *See also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2329–30 (2013). The panel majority did not cite *Rust* and did not address the State's claim that the text and logos on specialty license plates fall within the scope of a government program and therefore remain subject to the State's control.

Third, the State had argued that governments, like private individuals, enjoy a freedom *not* to speak, which

includes the right to disassociate from messages or viewpoints that they do not wish to convey. *See, e.g.*, *Summum*, 555 U.S. at 467–68 ("A government entity ... is entitled to say what it wishes *and to select the views that it wants to express.*") (emphasis added) (internal quotation marks and citations omitted); *Perry v. McDonald*, 280 F.3d 159 (2d Cir. 2001) (upholding a State's decision to revoke a previously issued vanity license plate that contained a vulgar combination of letters); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995); *Wooley v. Maynard*, 430 U.S. 705 (1977). Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *Wooley*, 430 U.S. at 715, neither should a State be forced to convey a license-plate holder's message by etching it onto a plate marked with the State's name. The majority opinion did not address whether (or to what extent) a State may disassociate from messages, symbols, or viewpoints that it does not wish to propagate. *See generally Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995) (upholding Texas's exclusion of the Ku Klux Klan from its Adopt-a-Highway program).

SUMMARY OF ARGUMENT

The Speech Clause prohibits the government from "*abridging*" an individual's "*freedom* of speech." U.S. Const. amend. I (emphasis added). It does not allow individuals to compel a State to support or propagate messages or symbols that the State does not wish to associate with. The respondents have every right to decorate

their cars with bumper stickers or placards that display the confederate battle flag. But they cannot commandeer the State into promoting the confederate battle flag on a state-issued license plate.

The court of appeals did not go so far as to hold that the Speech Clause *requires* the State of Texas to issue a confederate-flag license plate. Any such holding would reach far beyond the text of the Speech Clause, which protects only the individual's freedom of speech and does not require governments to aid or abet one's efforts to propagate a message or viewpoint. Instead, the court of appeals held that Texas lost its prerogative to exclude the confederate battle flag from its license plates once it started placing state-approved and state-supported messages on *other* license plates and selling those "specialty" plates to the State's motorists. The court of appeals' holding is wrong and should be reversed.

1. The court of appeals erred by failing to recognize that the messages and symbols that appear on state-issued license plates are government speech, and that States may therefore choose to promote certain viewpoints and not others when designing the license plates that they will issue to their motorists. The District of Columbia's license plates bear the phrase "Taxation Without Representation"; the Speech Clause does not require the district to offer license plates with messages praising the district's lack of voting representation in Congress. States that issue "Fight Terrorism" specialty plates are not required to offer specialty plates with messages that praise terrorist organizations. All of this is "viewpoint discrimination"—and all of it is constitutional because

the content of state-issued license plates is government speech and is therefore immune from any requirement of viewpoint neutrality. *See Summum*, 555 U.S. at 467–68 (holding that the Speech Clause does not require viewpoint neutrality in government speech).

For three independent reasons, the Court should uphold the State's refusal to issue a confederate-flag license plate under the government-speech doctrine. First, the government-speech doctrine permits a State to control the messages, symbols, or viewpoints used within the scope of a government program, and the content and design of state-issued license plates unquestionably occurs within the specialty-plate "program" that the State of Texas has created. *See Rust*, 500 U.S. at 194. That private motorists are willing to assist the State in propagating its state-approved license-plate designs—and to pay the State for this privilege—does not convert the State's specialty-plate "program" into a "forum" for private speech. *See Johanns*, 544 U.S. at 562 (holding that a State is "not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message.").

Second, the government-speech doctrine permits a State to disassociate from messages, symbols, and viewpoints that it does not wish to transmit or promote. A State is fully within its rights to exclude swastikas, sacrilege, and overt racism from state-issued license plates

that bear the State's name and imprimatur. Likewise, a State can exclude less pernicious but still-controversial symbols such as the confederate battle flag. Just as the Constitution protects individual license-plate holders from being forced to transmit "the State's ideological message," *Wooley*, 430 U.S. at 715, neither can a State be forced to convey a license-plate holder's message by etching it onto a plate bearing the State's name. Texas—no less than a private motorist—has every right to insist that the messages and logos displayed on its license plates are mutually agreeable to both the driver and the State.

Third, the content of specialty license plates qualifies as "government speech" for the same reasons that a monument displayed in a public park is government speech: The State "effectively control[s]" and exercises "final approval authority" over the design, and a specialty plate is reasonably and routinely perceived as conveying some message on the government's behalf. *Summum*, 555 U.S. at 473. Indeed, the very reason that the respondents *want* the confederate battle flag depicted on the state-issued license plate—rather than being content to display the flag on far-more-visible adornments such as bumper stickers or paint jobs—is because the license-plate image comes with the State's seal of approval. But when a State places its imprimatur on a message or symbol by engraving it onto a state-issued license plate, it is engaged in government speech and may prefer certain viewpoints to the exclusion of others. *See ibid.*; *ACLU v. Bredesen*, 441 F.3d 370, 375–76 (6th Cir. 2006).

2. The court of appeals committed additional error in holding that the State had engaged in "viewpoint discrimination" by refusing to issue a confederate license plate. Pet. App. 18a. The State of Texas has not issued any specialty plate that negatively portrays the confederacy, the confederate battle flag, or the views espoused by the Sons of Confederate Veterans. Because the State has not issued *any* specialty plates reflecting *any* views on these topics, its actions (at most) reflect content or subject-matter discrimination, not viewpoint discrimination. *See, e.g., Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 650 F.3d 30, 36, 39–40 (2d Cir. 2011) (distinguishing between content and viewpoint discrimination). The respondents cannot prove that the State has committed "viewpoint discrimination" in its specialty-plate program until it issues a specialty plate expressing one viewpoint on a topic and formally rejects a request for a plate expressing a different view on that same topic.

ARGUMENT

I. THE GOVERNMENT-SPEECH DOCTRINE ALLOWS STATES TO DETERMINE THE CONTENT OF STATE-ISSUED LICENSE PLATES

The Speech Clause protects the individual's "freedom of speech" from government intrusion. It does not give individuals a right to commandeer the machinery of government to promote their desired message. The Speech Clause, like so many provisions in the Constitution, is a protection of negative rather than positive rights. *See, e.g., Harris v. McRae*, 448 U.S. 297, 315 (1980) (noting

the "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy"); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("[T]he Constitution is a charter of negative rather than positive liberties."); *see generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986).

The government-speech doctrine polices the boundary between claims that demand relief from government interference with private speech, and claims that seek to give private individuals control over the government's decisions to speak, to refrain from speaking, or to subsidize or withhold support from private messages. No individual has the right to thwart the government from promoting its message (or supporting private messages) with the resources or revenues that it collects. *See Johanns*, 544 U.S. at 559–62. And no individual has the right to force the government to propagate a message that it does not support or does not wish to associate with. *See Summum*, 555 U.S. at 467–77.

Three principles have emerged from this Court's recognition of the government's right to speak. First, a State may regulate the messages and symbols used within the scope of a government program. *See Agency for Int'l Dev.*, 133 S. Ct. at 2329–30; *Rust*, 500 U.S. at 194. Second, the "freedom of speech" enjoyed by the government as well as private individuals includes the right to disassociate from messages or symbols that one does not wish to associate with. *See Summum*, 555 U.S. at 467–68; *Boy Scouts*, 530 U.S. at 659; *Hurley*, 515 U.S. at 557, 573;

Wooley, 430 U.S. at 715. Third, the government-speech doctrine protects a government's decision to accept or reject privately funded or donated displays on public property. *See Summum*, 555 U.S. at 472–73 (explaining that the defendant city "effectively controlled" the messages conveyed by monuments in a park and exercised "final approval authority" over their selection—even though the monuments and their messages were created and proposed by private citizens).

Each of these principles—standing alone—is sufficient to uphold the Board's rejection of the confederate-flag license plate under the government-speech doctrine. And standing together, they present an insurmountable obstacle to the respondents' Speech Clause claim.

A. The Government-Speech Doctrine Permits States To Limit Speech That Occurs Within The Scope Of A Government-Created Program

This Court has long recognized that the government-speech doctrine allows States to regulate the messages and symbols that are used within the scope of a government program. *See Rust*, 500 U.S. at 194 ("[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program."); *see also Agency for Int'l Dev.*, 133 S. Ct. at 2329–30.

The text and logos that appear on specialty license plates fall within the scope of the State's specialty license-plate program, and thus remain subject to the State's control. *See* Tex. Transp. Code §§ 504.002(3), .008(e). Just as the federal government may exclude

abortion-promoting speech from the scope of its Title X program, *see Rust*, 500 U.S. at 178, 203, so may Texas exclude pro-confederacy speech or symbols from the specialty-plate program that it has created.

This remains true even when private citizens or private entities partner with the State in implementing a government program—and even when private parties deliver the "speech" that occurs within the scope of that program. *See Johanns*, 544 U.S. at 562 (holding that a State is "not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger*, 515 U.S. at 833 ("[W]e have permitted the government to regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message."); *Rust*, 500 U.S. 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.").

This Court has recognized that the boundary that defines the scope of a government "program" is not always clear, and it has cautioned litigants not to manipulate the definition of a program in an effort to defeat a Speech Clause claim. *See Agency for Int'l Dev.*, 133 S. Ct. at 2328; *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). In this case, however, the contours of the program are obvious. The "speech" that appears on the state-approved and state-issued license plate is within

the specialty-plate program, while "speech" that appears elsewhere on a vehicle is outside the program.

A State could not withhold a license plate—or exclude a motorist from its specialty-plate program—on account of expression displayed elsewhere on the motorist's car. But as in *Rust*, a State may insist on physical separation between the speech that occurs within the program and the speech that the State does not wish to subsidize or promote. *See* 500 U.S. at 180–81 (upholding regulations requiring "physical separation" between government-funded Title X projects and abortion-promoting activities). The respondents remain free to display the confederate battle flag on bumper stickers or elsewhere on their vehicles, but Texas may require that display to be physically separated from the state-issued license plate that bears the State's imprimatur.

The court of appeals never denied that the "speech" that appears on specialty license plates occurs within the scope of the State's specialty-plate program. Indeed, the court of appeals entirely ignored the State's scope-of-the-program argument and did not cite or attempt to distinguish *Rust*. *See* Appellees' Br. 14–15, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411). The respondents likewise did not deny that the "speech" on their proposed license plate would occur within the scope of a state-created program. Instead, they tried to distinguish *Rust* by arguing that the State's specialty-plate program "is not a government subsidy," but a "revenue-generating" program in which motorists pay a fee in exchange for a state-issued license plate adorned with their preferred message or design.

Reply Br. 6, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411).

The respondents' efforts to distinguish *Rust* are unavailing. That motorists must pay fees in exchange for their specialty plates does not change the fact that the State is supporting and propagating their desired messages by etching them onto state-issued and state-owned license plates. The State does not relinquish control over the messages that it will support simply because the "program" generates offsetting benefits to the State's fisc. The State is supporting a message *in exchange for a fee*, but it is still supporting the messages that appear on its license plates and retains the prerogative to choose the type of speech that it is willing to promote. And the fee that the State collects does not change the fact that the "speech" that appears on the government-issued license plate still occurs within the scope of a state-created program—and therefore should remain subject to the State's control.

The fallacy of the respondents' argument becomes evident when one considers the following hypothetical. Suppose that Title X had been established not as a welfare program, but as a revenue-generating enterprise that provided family-planning services at market prices and remitted its profits to the federal treasury. Would that disable the government from excluding abortion-promoting speech within the scope of that government-created program? Of course not. In that scenario, *Rust*'s holding would remain equally applicable and allow the government to decide whether its revenue-generating

family-planning program should allow or disallow abortion referrals or other abortion-promoting speech.

The same would be true if a State established a revenue-generating public school that charged tuition and turned over its profits to the State's treasury. The State would hold the same prerogative that it wields over traditional public schools to control the curriculum taught within the scope of this state-created "program"—and it could prohibit the teaching of disfavored "viewpoints." *See Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) (noting that the Speech Clause "allows educators to make viewpoint-based decisions about school-sponsored speech"). The State's authority to regulate speech that occurs inside a government-created program does not turn on whether the program operates at a net loss or net gain to the State's fisc. It turns on the government's authority to speak, and its authority to establish programs that promote speech that the government wishes to promote and exclude speech that it wishes not to promote.[2]

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[2] In all events, the respondents' attempt to distinguish government "subsidies" from "revenue-generating" programs is untenable. Almost every government subsidy is designed to produce offsetting benefits to the government's fisc, and is therefore a "revenue-generating" program regardless of whether the government collects fees directly from the program's beneficiaries. By investing in family-planning services, Title X, for example, seeks to reduce government expenditures (and loss of tax revenues) caused by unplanned pregnancies. That is no less a "revenue-generating" program than the Texas specialty-plate program. The respondents have no basis for insisting that Title X be declared a government "subsidy" by ignoring the offsetting fiscal benefits that Title X produces, while (continued...)

Finally, the respondents are wrong to suggest that a "sponsored" specialty plate—such as the one proposed by the Sons of Confederate Veterans—serves as a revenue-generating venture for the State. The funds collected under the "sponsored" specialty-plate program are used to offset the cost of producing the plates and pay a small administrative fee to the county Tax Assessor ($ .50), with the remainder of the "extra" fee going to the nonprofit entity featured on the plate. *See* Tex. Transp. Code § 504.801(e). The State receives no profits from selling the specialty plates that are sponsored by nonprofit organizations.

The only other way to escape *Rust* is to characterize the State's specialty-plate program as a "forum" for private speech in which viewpoint-neutrality is required. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992).[3] But the State's program

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simultaneously demanding that the offsetting fiscal benefits produced by Texas's specialty-plate program disqualify it from the title of "subsidy." *See generally* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 1311 (2002).

[3] Without applying any "forum" analysis, the court of appeals assumed that a "no viewpoint discrimination" rule followed automatically from its conclusion that "specialty license plates are private speech." Pet. App. 12a. That was error. There is no constitutional requirement that the government maintain viewpoint neutrality among private speakers. Congress may subsidize private speech that promotes democracy without subsidizing private speech that advocates fascism or communism. *See Rust*, 500 U.S. at 194. And governments may withhold tax subsidies from private institutions that espouse racially discriminatory views. *See Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Only when a "forum" for private (continued...)

cannot plausibly be described as opening a "forum" for private speech. To begin, every specialty-plate design must be approved by the DMV Board before it can appear on a state-issued license plate. *See* 43 Tex. Admin. Code § 217.28(i)(7). A State has not opened a "forum" for private speech when the State retains absolute control over the speech that takes place within the scope of its program. That the State allows private citizens to *propose* specialty-plate designs for State approval does not convert the state-approved messages into a "forum." Government speech can always be influenced by private citizens or private interest groups; the State's willingness to entertain proposals from outside sources does not forfeit its control over the license-plate designs that it will approve.

That the State has approved a large number of specialty plates likewise does not mean that the State has established a "forum" for private speech. The State retains absolute editorial control over the content of those plates, and the panoply of specialty plates reflects not the absence of editorial control, but rather the diverse array of Texans' educational backgrounds, interests, and points of pride that the State is willing to showcase. *See,*

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speech has been created does a "viewpoint neutrality" requirement kick in. *See Summum*, 555 U.S. at 468 ("It is the very business of government to favor and disfavor points of view" (citations and internal quotation marks omitted)). The court of appeals erred by *assuming* a prohibition on viewpoint discrimination without first analyzing whether the State had created a "forum" for private speech.

e.g., Scott W. Gaylord, *"Kill the Sea Turtles" and Other Things You Can't Make the Government Say*, 71 Wash. & Lee L. Rev. 93, 143–51 (2014) (hereinafter "Gaylord").

Finally, the State is *charging* its citizens who wish to display state-approved specialty license plates on their cars, and the respondents do not challenge the State's prerogative to assess fees for specialty plates. It is hard to see how a "forum" for private speech can exist when the State is imposing monetary assessments on those who wish to engage in what is supposed to be a constitutionally protected speech activity. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 135-36 (1992); *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

The sounder view is to treat the display of a specialty license plate not as "private speech" protected by the First Amendment, but as a business transaction between the government and a private citizen. The State is selling a specialty plate adorned with a state-approved and state-owned design. *See* Tex. Transp. Code § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate."). In return, the State receives money to cover the costs of the plate and fund projects or nonprofit entities that the State deems worthy of support. The motorist is purchasing the prestige and satisfaction of having the State's seal of approval appearing behind a message that he supports. And the State is willing to undertake this transaction because the revenue it receives offsets the costs (if any) of sponsoring the message or design that appears on the specialty license plate. Forum analysis has no application when the State is selling its imprimatur or charging its citizens for a

state-created product; there is no First Amendment right to force the State into a business transaction that is not mutually beneficial to the State and the motorist.

B. The Government-Speech Doctrine Permits A State To Disassociate From Messages Or Symbols That It Does Not Wish To Propagate

The government-speech doctrine protects more than the government's own speech—although it certainly protects that. *See Summum*, 555 U.S. at 467 ("A government entity has the right to speak for itself.") (citation and internal quotation marks omitted). It also protects the government's right *not* to speak—and to disassociate from speech and viewpoints that it does not wish to promote or convey. *See id.* at 467–68 ("A government entity ... is entitled to say what it wishes *and to select the views that it wants to express*.") (emphasis added) (citation and internal quotation marks omitted). A State—no less than private entities—has the right to disassociate from messages or symbols that it does not wish to propagate. *See ibid.*; *Perry*, 280 F.3d at 169–70 (upholding State's decision to revoke vanity license plates with vulgar combinations of letters); *see also Boy Scouts*, 530 U.S. at 659; *Hurley*, 515 U.S. at 573; *Wooley*, 430 U.S. at 715.

The State of Texas has long exercised its prerogative to disassociate from messages, organizations, or viewpoints that it regards as odious. Texas, for example, excludes the Ku Klux Klan from its Adopt-a-Highway program—a program in which a business or organization "adopts" two miles of highway and collects litter, and the State in return posts signs naming the adopter at both

ends of the adopted miles. Texas rejected the Ku Klux Klan's application to adopt a highway because it is unwilling to associate with the racist viewpoints espoused by that organization. *See Knights of the Ku Klux Klan*, 58 F.3d at 1079–80 (upholding the State's exclusion). The Speech Clause of course protects the Ku Klux Klan's right to espouse racist beliefs. But the government-speech doctrine protects the State's prerogative to disassociate from those views—and to refrain from creating and posting signs honoring organizations that promote those views.

The government-speech doctrine equally protects the State's right to disassociate from viewpoints in its specialty-license-plate program. When a State manufactures and issues a specialty license plate adorned with the State's name, it is placing the State's imprimatur and prestige behind the messages and symbols that appear on the license plate. It is akin to a NASCAR driver's decision to sell advertising space on his uniform—the driver is publicly placing his name and reputation behind the messages, products, and corporations that appear on that uniform. Those advertisements are undoubtedly the "speech" of the NASCAR driver. One cannot acknowledge this and simultaneously deny that the State's decision to exclude the confederate battle flag from its state-issued license plates involves government speech.

Denying the government's right to disassociate from messages, symbols, and viewpoints that it does not wish to convey would have untenable and far-reaching consequences. Local governments would be unable to exclude

racist advertisements from city buses. School districts would be unable to exclude ads promoting marijuana legalization from school newspapers, yearbooks, and athletic programs. *But cf. Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (upholding a school principal's decision to discipline a student for displaying a banner advocating drug use). All of these exclusions would turn on the "viewpoint" expressed in the advertisements—but there is nothing unconstitutional about that. It is simply a decision by the government to withhold its sponsorship from messages and viewpoints that it is unwilling to associate with.

The panel majority said nothing about a government's right to disassociate from speech that it is unwilling to promote or propagate. And it made no effort to explain how the Speech Clause can protect the right of private citizens to disassociate from speech yet entirely withhold this prerogative from the government. Instead, the court of appeals held that the government-speech doctrine can apply *only* when "a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech that the government chooses to oblige." Pet. App. 11a (quoting *Summum*, 555 U.S. at 487 (Souter, J., concurring in the judgment)). This is wrong for numerous reasons.

First, the court of appeals' "test" for government speech has never been accepted by this Court; it appears only in an opinion by Justice Souter concurring in the judgment in *Summum*. *See* 555 U.S. at 487 (Souter, J., concurring in the judgment)). No other Member of the Court joined the opinion or endorsed the "reasonable ob-

server" test. And it is hard to see how Justice Souter's "reasonable observer" proposal could be squared with *Johanns*, which held beef advertisements to be "government speech" based on the government's control over the message—and without any inquiry into whether a "reasonable observer" would perceive the advertisements as speech of the government. *See* 544 U.S. at 560–62; *id.* at 564 (noting that the beef advertisements were attributed to "America's Beef Producers," rather than the federal government); *id.* at 564 n.7 ("[T]he correct focus is not on whether the ads' audience realizes the Government is speaking"); *ibid.* ("As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's*.") (emphasis added); Pet. App. 29a (Smith, J., dissenting) ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided.").[4]

Second, the "reasonable observer" standard has failed to produce doctrinal coherence in the Court's Establishment Clause jurisprudence, and it should not be exported to other constitutional doctrines such as government speech. *See, e.g.*, *County of Allegheny v. ACLU*,

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[4] *See also* Gaylord, *supra*, at 127 ("*Summum* and *Johanns* focus on the level of control the government exercises over the speech, not on whom a reasonable observer views as the literal speaker."); *id.* at 131 ("*Johanns* precludes courts from limiting the government speech doctrine to situations in which a reasonable observer would know that the government is speaking.").

492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (criticizing the "reasonable observer" test as a "most unwelcome[] addition to our tangled Establishment Clause jurisprudence.").

The imagined reactions of a hypothetical "reasonable observer" are almost impossible to confirm or refute with data or evidence. And the question of how to characterize the background knowledge or assumptions of the "reasonable observer" is entirely indeterminate; this causes different jurists to reach diametrically opposing conclusions. *Compare Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (opinion of Kennedy, J.) ("It is presumed that the reasonable observer is acquainted with this tradition [of legislative prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews."), *with id.* at 1851 (Kagan, J., dissenting) (accusing the majority of "allowing the Town of Greece to turn its assemblies for citizens into a forum for Christian prayer"); *see also Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1119 (10th Cir. 2010) (en banc) ("How much information we will impute to a reasonable observer is unclear") (citation and internal quotation marks omitted); *id.* at 1108 (Gorsuch, J., dissenting from denial of rehearing en banc) (criticizing the panel opinion's "reasonable observer" as "biased, replete with foibles, and prone to mistake").

Similar efforts to incorporate the "reasonable person" standard into constitutional law have not fared well. *See, e.g.*, C. Peter Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Sup. Ct. Rev. 7, 59 (describing this Court's obscenity cases, which ask whether "the average person applying contemporary community standards" would find that the dominant theme of the material taken as a whole appeals to the prurient interest, as producing a "constitutional disaster area"). The "reasonable observer" standard also suffers from the same circularity as the "reasonable expectation of privacy" test in Fourth Amendment law: The perceptions of the "reasonable observer" will depend in part on the constitutional pronouncements from this Court. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 34 (2001).

Third, even if this Court were to attempt to apply the "reasonable observer" standard to the State's specialty-plate program, any "reasonable observer" should view the messages and symbols on specialty plates as the speech of *both* the motorist and the State. *See* Pet. App. 41a (Smith, J., dissenting); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[S]peech in fact can be, at once, that of a private individual *and* the government.") (emphasis added); Joseph Blocher, *Government Property and Government Speech*, 52 Wm. & Mary L. Rev. 1413, 1480 (2011) ("[A] reasonable observer would probably conclude that both the owner of the vehicle displaying the plate and the state government that authorized it support the plate's message."). The motorist selected the

specialty plate and paid a fee to display it on his car, while the State approved the specialty-plate design and placed its name and imprimatur behind the motorist's preferred design. The government and the motorist are collaborating to propagate a message that each of them supports.

The court of appeals' observation that it is "confident that a reasonable observer would know that a specialty license plate is the speech of the individual driving the car" is therefore beside the point. Pet. App. 16a. The specialty plate displays a message promoted *jointly* by the motorist and the State—and that empowers *both* the State and the motorist to insist that the content of the plate is mutually agreeable. *See Wooley*, 430 U.S. at 715. It is no different from the situation in *Summum*, where the monuments in the city park convey messages supported by both the donor of the monument and the city that accepted the monument for public display. *See infra* pp. 32–41.

Fourth, the court of appeals' "reasonable observer" test is insupportable because the government-speech doctrine protects more than simply the government's right to disseminate a government-crafted message. It also protects the government's right *not* to speak, and to refrain from placing its name and prestige behind viewpoints that it is unwilling to associate with or endorse. Municipalities and school districts may sell or lease advertising space on their buses to organizations that promote anti-smoking messages without triggering a corresponding constitutional obligation to sell advertising space to tobacco companies. *See, e.g.*, Minn. Stat.

§ 123B.93(a)(1); N.J. Stat. § 18A:39-31; N.M. Stat. § 22-28-1A(1); Tenn. Code § 49-6-2109(e); Utah Code § 41-6a-1309(2)(b)(iii)(A). That is because the government-speech doctrine allows the government to choose the messages and viewpoints that it will propagate and those that it will not. Governments hold that same prerogative when deciding whether to accept or reject a specialty-plate design that will appear on a state-issued license plate bearing the State's name. And they may engage in "viewpoint discrimination" when doing so.

C. A State's Decision To Accept Or Reject Specialty-Plate Designs Is Akin To A City's Decision To Accept Or Reject Privately Donated Monuments For Display On Public Land

There is yet a third and independent reason that the government-speech doctrine insulates the State's rejection of the confederate-flag license plate from First Amendment attack: The State's refusal to accept the respondents' proposed license plate into the State's specialty-plate repertoire is akin to Pleasant Grove City's decision to reject Summum's proposed monument for display in a public park. *See Summum*, 555 U.S. at 465–66.

Summum, a religious organization, had wanted to donate a monument for placement in a city park. The city declined, even though it had previously accepted and installed eleven other privately donated monuments in that park. *Id.* at 464–66. Summum sued, claiming that the city had violated the Speech Clause, but this Court held that the city's decision whether to accept a privately donated

monument for display in the park was "government speech" and exempt from any requirement of "viewpoint neutrality." *Id.* at 472, 479.

Accepting or rejecting a proposed specialty license-plate design likewise qualifies as government speech under this Court's reasoning in *Summum*. This is true for at least two reasons.

First, *Summum* holds that a State's "final approval authority" and "effective control" over a proposed message makes the approved message government speech, even if it is designed or proposed by private entities:

> [I]t is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. *Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection.*

555 U.S. at 472–73 (emphasis added) (*quoting Johanns*, 544 U.S. at 560–61); *see also Chiras v. Miller*, 432 F.3d 606, 616 (5th Cir. 2005) (holding that "the selection and use of textbooks in the public school classrooms constitutes government speech"). And this makes eminent sense. Judicial opinions are still the "speech" of the

judge who edits, approves, and signs them, even if law clerks assist in drafting them.

The State of Texas holds "final approval authority" and "effective control" over *every* specialty-plate design—the same prerogatives that Pleasant Grove City wielded over the monuments displayed in its parks. *See* 43 Tex. Admin. Code § 217.28(ii)(8)(B) (providing that the Department of Motor Vehicles Board "has final approval authority of all specialty license plate designs"); *see also* Tex. Transp. Code § 504.6011(a); 43 Tex. Admin. Code § 217.40.

Neither the respondents nor the court of appeals has ever denied that the State has complete editorial control and final approval authority over specialty license plates. Instead, they claim that the role of private citizens in proposing specialty-plate designs—and in selecting state-approved designs for display on their cars—take this case outside the government-speech doctrine. *See* Reply Br. 3–4, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411) ("The whole reason that drivers purchase specialty plates in the first place is to personally express a message they themselves endorse."); Pet. App. 13a ("[L]icense plates, even when owned by the government, implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle.").

Yet *Summum* makes clear that a State may allow private entities to propose or propagate government speech—without forfeiting the State's prerogative to control the content of these government-approved messages. *See* 555 U.S. at 468; Gaylord, *supra*, at 141 ("Un-

der *Summum*, the government does not lose the protection of the government speech doctrine simply because a private person assists the government in creating or disseminating its message and, at the same time, seeks to engage in expressive activity."); *see also Rust*, 500 U.S. at 192–94; *Johanns*, 544 U.S. at 562; *Rosenberger*, 515 U.S. at 833. What matters is whether the State "exercises final approval authority over every word used." *Johanns*, 544 U.S. at 561; *see also* Gaylord, *supra*, at 125. There is no dispute that it does.

Second, the State's willingness to engrave the State's name on a plate and issue that plate to a motorist signals that the State approves of its message—or is at least willing to associate with that message. This also suffices to trigger the government-speech doctrine and immunize the State from any requirement of viewpoint neutrality. As the Court explained in *Summum*:

> It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf.

555 U.S. at 471.

The same is true of specialty license plates. States do not approve specialty plates containing messages with which the State is unwilling to associate (as this case

demonstrates). And drivers who observe specialty plates routinely and reasonably interpret them as conveying some message on the State's behalf: "Fight Terrorism," "Stop Child Abuse," "Mothers Against Drunk Driving," "Keep Texas Beautiful," "Operation Iraqi Freedom," "Insure Texas Kids," and "Share the Road." Indeed, the very reason the respondents *want* to display their logo on a state-issued license plate (rather than a bumper sticker) is because the specialty license plate comes with the appearance of state approval. The respondents could display their logos and messages far more prominently on other portions of their cars. Yet the respondents prefer the less conspicuous specialty license plate (even though they must pay a fee for it) because it would give their organization the prestige of the State's support.

The respondents have argued that some of the state-approved messages on Texas specialty plates are too parochial to be regarded as the government's speech. Some plates, for example, promote out-of-state universities, private businesses (Dr. Pepper, Mighty Fine Burgers), or messages tailored to the idiosyncrasies of the driver ("Rather be golfing."). The respondents insist that *these* messages "cannot possibly be considered government speech"—even if the more public-spirited specialty plates ("Fight Terrorism," "Keep Texas Beautiful") could pass as government messages. Reply Br. 9, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411).

The respondents are wrong to contend that the State's willingness to sponsor parochial messages forecloses a finding of government speech. To begin, the

State is *selling* its imprimatur, rather than offering it free of charge. It is entirely to be expected that when a person or entity is being paid for its sponsorship, it becomes more likely to utter messages that it would not propagate in the absence of remuneration.

Consider once again the analogy to the NASCAR driver. *See supra* p. 26. No one would expect state governments (or NASCAR drivers) to independently promote messages supporting golf, private businesses, or out-of-state universities. But when they are *paid* to partner with private entities in promoting those messages, the speech belongs as much to the sponsor as it does to the advertiser—regardless of the content of the message. The payments make the State less choosy in the messages and designs that it selects for display on its specialty license plates. But neither the payments nor the reduced choosiness take the State's specialty-plate program outside the realm of government speech. The messages and logos on a NASCAR driver's uniform are still the speech of the NASCAR driver—even though the driver is paid for his sponsorship and would not promote those companies absent their payments. So too for the messages that the State selects for its specialty-plate program.[5]

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[5] For these reasons, the Ninth Circuit erred by holding that the "revenue raising purpose" of a State's specialty-plate program cuts against a finding of government speech. *See Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008). That the State collects fees in exchange for promoting the messages on its specialty license plates does nothing to diminish the State's total control over the speech that appears on those plates.

Consider also the example of monuments displayed in public parks. Many of these contain parochial messages. *See Summum*, 555 U.S. at 465, 470–72, 474–77. But that does not change the fact that accepted monuments "are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472; *see also id.* at 476–77 ("By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator.... By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). If a city collected fees from organizations wishing to place their monuments in public parks, it might broaden the universe of monuments that the city would be willing to accept. But none of that would change this Court's holding that monuments displayed in public parks are government speech—and it assuredly would not convert the monument display into a "forum" for private speech. There will always be some monuments (and specialty-plate designs) that a State will not accept no matter how much a sponsor is willing to pay.

Finally, it is impossible for license-plate speech to occur without the government's cooperation and affirmative aid. Private citizens have no authority or ability to make license plates to display on their cars; the State holds a monopoly on production and must therefore lend its approval and assistance for any license-plate speech to occur. This leaves an unavoidable impression that

messages on specialty license plates are government-sanctioned speech—even if private citizens play a role in shaping, influencing, or propagating the message. And even if a private citizen or organization provided the design, the Department of Motor Vehicles holds all intellectual property rights in the messages and images that appear on a state-issued license plate. *See* Tex. Transp. Code § 504.002(3) ("[T]he department is the exclusive owner of the design of each license plate.").[6]

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[6] In the court of appeals, the respondents argued that specialty plates should not be deemed government speech because otherwise Texas would violate the Establishment Clause by issuing specialty plates emblazoned with "One State Under God." *See* Appellants' Br. 39, *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388 (2014) (No. 13-50411). The premise of this argument is dubious. Courts have already rejected an Establishment Clause challenge to the inclusion of "one state under God" in the Texas Pledge of Allegiance. *See Croft v. Perry*, 624 F.3d 157, 170 (5th Cir. 2010). If it is constitutional to include "one state under God" in the state pledge of allegiance that schoolchildren must recite each morning, then it should also be constitutional to include "One State Under God" on a state-issued license plate. Courts have also rejected constitutional challenges to the presence of a Christian cross in a city's insignia, which is undeniably government speech. *See Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991); *see also Summum*, 555 U.S. at 483 (Scalia, J., concurring). But even if the respondents were correct to assert that the "One State Under God" license plate would violate this Court's Establishment Clause doctrine, that is not a reason to conclude that specialty license plates are private speech rather than government speech. The standard for determining government speech cannot be affected by a desire to save (or condemn) a particular license plate that the State has issued.

The court of appeals acknowledged *Summum* but tried to limit its holding to permanent monuments placed in public parks. Pet. App. 10a–11a (noting that the Court's "conclusion" in *Summum* "focused on the nature of both permanent monuments and public parks."). It is certainly correct to observe that this Court considered the nature of monuments placed in public parks in deciding whether the city was engaged in "government speech." But one cannot pass off *Summum* as a fact-bound holding that extends no further than a government's decision to accept or reject monuments for display in public parks.

What was crucial to this Court's government-speech finding in *Summum* was that: (1) the city "effectively controlled" the messages displayed by the monuments by exercising "final approval authority" over whether a monument should be placed in the park, 555 U.S. at 473; and (2) monuments on land are routinely and reasonably perceived as "conveying some message on the property owner's behalf," *id.* at 471. Both of those conditions apply here. Indeed, neither the court of appeals nor the respondents have argued otherwise. Their only response is to observe that specialty plates *also* convey a message on the motorist's behalf, but that does not distinguish *Summum*. The monuments that were accepted for the city park undoubtedly conveyed a message on the donor's behalf as well.

The court of appeals also tried to buttress its no-government-speech holding by observing that it was "consistent with the majority of other circuits that have considered the issue." Pet. App. 14a. But that does not

supply a legal justification for the court of appeals' ruling. *See* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148, 152 (2005) ("[T]here is no imperative to choose the most widespread practice or rule, for example, if the minority position seems better thought out."); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (rejecting an interpretation of a statute that had been adopted by all 11 courts of appeals to have considered the question). What matters is whether those other appellate-court decisions supply persuasive *reasons* for rejecting the State's government-speech argument and its reliance on *Summum*. And they do not. All but one of those decisions pre-dates *Summum*,[7] and the one that does not relegates its discussion of *Summum* to a footnote and does not address any of the arguments that the State has advanced in this case. *See Roach*, 560 F.3d at 868 n.3.

D. Requiring States To Maintain "Viewpoint Neutrality" When Selecting The Messages That Appear On State-Issued License Plates Will Lead To Untenable Consequences

Finally, the notion that the Constitution requires States to maintain "viewpoint neutrality" when choosing

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[7] *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc., v. White*, 547 F.3d 853, 863 (7th Cir. 2008); *Ariz. Life Coal.*, 515 F.3d at 965; *Sons of Confederate Veterans, Inc., ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002).

the content of state-issued license plates will have untenable and far-reaching consequences. Texas and other States issue "Fight Terrorism" license plates; a ban on viewpoint discrimination would require these States to offer specialty plates with pro-terrorism messages. The same would apply to specialty plates with messages such as "Stop Child Abuse," "Mothers Against Drunk Driving," and "Keep Texas Beautiful." Under the court of appeals' "no viewpoint discrimination" rule, none of these specialty plates can survive unless the State also provides specialty plates with messages supporting child abuse, drunk driving, and littering.

The Fourth Circuit has already applied the *reductio ad absurdum* of this approach by forbidding States to issue "Choose Life" license plates unless they issue specialty plates with pro-abortion messages. *See, e.g.*, *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004); *see also ACLU of N.C.*, 742 F.3d at 570. None of the judges on the *Planned Parenthood of South Carolina* panel attempted to explain how "Fight Terrorism" license plates, or the countless other specialty plates that favor one viewpoint at the expense of another, could survive their "no viewpoint discrimination" regime. *See* 361 F.3d at 787–800 (opinion of Michael, J.); *id.* at 800–01 (opinion of Luttig, J.); *id.* at 801 (opinion of Gregory, J.). Nor did they explain how the District of Columbia can issue "Taxation Without Representation" license plates to *all* of its drivers without simultaneously offering license plates with messages supporting the status quo.

There is nothing wrong—and there is surely nothing unconstitutional—with a State favoring certain viewpoints over others when selecting the messages that it will display on state-issued license plates. States may choose speech that promotes tolerance over bigotry, nonviolence over violence, smoking cessation over smoking, and humane treatment of animals over animal cruelty. *See Summum*, 555 U.S. at 467–68 ("It is the very business of government to favor and disfavor points of view" (citation and internal quotation marks omitted)).

Courts sometimes recoil at the notion that governments could engage in "viewpoint discrimination" when choosing the messages that will appear on their license plates. *See, e.g.*, *Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d at 626; *Roach*, 560 F.3d at 870. They should be more troubled by the thought that the Constitution requires "viewpoint neutrality" whenever the government chooses to associate with private organizations and their viewpoints. The Eighth Circuit, for example, has reached the astonishing conclusion that Missouri cannot exclude the Ku Klux Klan from its Adopt-a-Highway program because that would represent "viewpoint-based discrimination" against the Klan's racist ideology. *See Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004); *see also Cuffley v. Mickes*, 208 F.3d 702, 706 n.3 (8th Cir. 2000). Even if one assumes that this exclusion represents "viewpoint discrimination" against the racist views espoused by the Ku Klux Klan, what could possibly be *unconstitutional* about that? The First Amendment does not say that "no government shall engage in viewpoint discrimination." It prohibits laws that "abridge" the

"freedom of speech," and the Ku Klux Klan retains the same freedom to speak that it enjoyed before the Adopt-a-Highway program existed.

The holdings in *Robb* and *Cuffley* have left States and municipalities unable to deny Adopt-a-Highway applications from the American Nazi Party and the North American Man/Boy Love Association ("NAMBLA")—out of fear that they will end up on the losing end of a lawsuit if they deny the requests.[8] And a ruling from this Court that imposes a "no viewpoint discrimination" rule on specialty-plate programs will leave the States wondering whether they can refuse to issue specialty license plates sponsored by NAMBLA, the Ku Klux Klan, or the American Nazi Party.

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[8] *See* Editorial, *County Should Have Rejected Nazis*, Portland Oregonian, Feb. 4, 2005, at B10 (reporting that a county in Oregon allowed the American Nazi Party to adopt a stretch of highway, out of fear that it would be sued for "viewpoint discrimination" if it denied the request); Charles Johnson, *Adopt-a-Nazi in Oregon*, Little Green Footballs (Jan. 28, 2005), http://bit.ly/148HAUn (displaying the adopt-a-road sign honoring the American Nazi Party); John Kass, *If This Group Is Involved, It's a Really Bad Sign*, Chi. Trib., Apr. 14, 2005, at C2, http://trib.in/1BeZLCa (last visited December 30, 2014) (reporting that the North American Man/Boy Love Association was allowed to adopt a highway in Illinois when local officials feared they would lose a "viewpoint discrimination" lawsuit); *id.* ("[O]ne official told him that legally, NAMBLA might have the right to the sign, given a recent court case in Missouri in which the Ku Klux Klan retained its name on a similar adopt-a-highway sign on 1st Amendment grounds."); *see also The Evolution of Humanity, Sexuality and Philosophy*, Tilted Forum Project (Apr. 14, 2005), http://bit.ly/16ZXeTf (displaying the NAMBLA Adopt-a-Highway sign) (last visited December 30, 2014).

The courts of appeals have taken the "no viewpoint discrimination" concept too far. The Speech Clause does not give racist organizations a right to force the government to administer a state-run program under a name or logo that the State does not wish to promote. But *Robb* and *Cuffley* follow inevitably from the "no viewpoint discrimination" regime espoused by the respondents and the court of appeals. The Court should put a stop to this and hold that the government-speech doctrine allows States to engage in "viewpoint discrimination" when deciding whether to partner with private organizations in administering a government program, and when deciding whether to place the State's imprimatur on messages or symbols.

This is not to say that the States have *carte blanche* to engage in viewpoint discrimination when issuing specialty license plates. Discrimination that lacks a rational basis would present equal-protection problems, as would racially biased decisionmaking. And acts of political favoritism or corruption would implicate a variety of good-government laws, including state-law Hatch Acts and laws forbidding government property to be used for electioneering activities.[9] But the respondents have not alleged that the Board members acted out of racial animus, so their decision is subject only to rationality re-

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[9] For this reason, Judge Wilkinson's suggestion that viewpoint neutrality is needed to prevent States from "issu[ing] plates touting one [presidential] candidate, but not another" is groundless. *See Planned Parenthood of S.C. Inc. v. Rose*, 373 F.3d 580, 581 (4th Cir. 2004) (Wilkinson, J., concurring in the denial of rehearing en banc).

view. And it is rational for the State to disassociate from a symbol that many citizens will find racially offensive.

II. THE COURT OF APPEALS ERRED BY FINDING THAT THE STATE HAD ENGAGED IN VIEWPOINT DISCRIMINATION BY REFUSING TO ISSUE A CONFEDERATE LICENSE PLATE

Even if the court of appeals were correct to impose a "no viewpoint discrimination" rule on the State's specialty-plate program, its holding should *still* be reversed because the respondents are not victims of viewpoint discrimination. The State has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans. *See, e.g., Choose Life Ill.*, 547 F.3d at 855 (no viewpoint discrimination when a State "has authorized neither a pro-life plate nor a pro-choice plate."). And the Board rejected the respondents' proposed license plate design because it determined that the confederate battle flag would be "offensive" to "member[s] of the public" under Texas Transportation Code § 504.801(c)—not because it opposed the respondents' efforts to commemorate the veterans of the confederacy or their beliefs regarding the meaning of the confederate flag. *See* Record 642–49; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (defining viewpoint discrimination as "an effort to suppress expression *merely because* public officials oppose the speaker's view" (emphasis added)).

A. The court of appeals claimed that the Board necessarily engaged in viewpoint discrimination when it

found that the confederate battle flag "might be offensive to any member of the public." *See* Pet. App. 18a–19a. The court thought that by rejecting the plate because some members of the public would find the flag "offensive," the Board "discriminated against Texas SCV's view that the Confederate flag is a symbol of sacrifice, independence, and Southern heritage." *Id.* at 18a. According to the court of appeals,

> [t]he Board's decision implicitly dismissed that perspective and instead credited the view that the Confederate flag is an inflammatory symbol of hate and oppression. Texas's specialty license plate program features a number of plates that honor veterans, including Korea Veterans, Vietnam Veterans, Woman Veterans, Buffalo Soldiers, Operation Iraqi Freedom, and World War II Veterans. Given Texas's history of approving veterans plates and the reasons the Board offered for rejecting Texas SCV's plate, it appears that the only reason the Board rejected the plate is the viewpoint it represents.

Id. at 18a–19a; *see also Sons of Confederate Veterans, Inc. v. Glendening*, 954 F. Supp. 1099, 1103–04 (D. Md. 1997) (adopting a similar argument).

The court of appeals mischaracterized the Board's action and the requirements of section 504.801(c). Section 504.801(c) requires the Board to assess *how members of the public will view* a proposed specialty license plate. That is an objective inquiry and has nothing to do with whether the Board approves of the license-plate de-

sign, or whether it approves of the public's likely reaction to that design.

Suppose that a group were to propose a specialty license plate that ridicules a sports team. The Board might reject that plate as "offensive" to some "member[s] of the public." But in deeming that plate "offensive," the Board would not be "implicitly dismiss[ing]" the perspective of people who designed the license plate, nor would it be "credit[ing]" the views of the team's fans who would find the plate offensive. Even the team's most outspoken detractor could recognize that the proposed specialty license plate is likely to offend some members of the public. A Board that nixes this license-plate design is not signaling whether it approves or disapproves of the viewpoint that the rejected plate seeks to advance. The same is true when the Board disapproves images or symbols such as the confederate battle flag. In recognizing that members of the public will be offended, the Board is simply acknowledging a fact of life. That does not in any way signify the Board's agreement with those who view of the flag as a symbol of racism.

Under the court of appeals' reasoning, the Board could not reject *any* message or symbol as "offensive," because that determination will necessarily involve "viewpoint discrimination" against those who hold the disputed message or symbol in high regard. A State that prohibits profanity on its license plates will be engaged in "viewpoint discrimination" against those who regard profanity as lyrical. *See Cohen v. California*, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric."). A State that prohibits swastikas on its license plates will be

engaged in "viewpoint discrimination" against those who regard the swastika as a venerated symbol. *See History of the Swastika*, United States Holocaust Memorial Museum, http://bit.ly/1y10tVK (last visited December 30, 2014) ("To this day [the swastiska] is a sacred symbol in Hinduism, Buddhism, Jainism, and Odinism. It is a common sight on temples or houses in India or Indonesia."). That is not a plausible theory of viewpoint discrimination.[10]

B. The court of appeals also complained that section 504.801(c) gives the Board "unbridled discretion" in deciding whether to approve proposed specialty license plates. Pet. App. 19a–22a. But section 504.801(c) calls for an objective inquiry: whether a license-plate proposal "might be offensive *to any member of the public*" (emphasis added). Predicting whether a license-plate proposal might offend others does not turn on the Board members' subjective feelings toward the plate, and it does not represent the "unbridled discretion" that troubled the Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988). Everyone knows that statements or logos touching on matters of politics or race are likely to offend others. And that principle is

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[10] Indeed, on the court of appeals' reasoning, there appears to be *nothing* that a State could exclude from its specialty license plates on the ground of offensiveness. Pet. App. 19a ("We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against."). This appears to leave the State powerless to exclude not only swastikas and profanity, but also sacrilege and overt racism.

far more objective than the standards of "artistic excellence and artistic merit" that govern the grant-making process of the National Endowment for the Arts. *See* 20 U.S.C. § 954(d)(1); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588–90 (1998) (rejecting First Amendment and vagueness challenges to the standards governing the NEA's grant-making process).

The Board does retain discretion to approve specialty license plates even when they might offend others. But there is nothing unconstitutional about discriminating among levels of offensiveness, especially when the State is deciding whether to place its imprimatur on a license-plate message. *See id.* at 584–85 (upholding federal statute requiring the National Endowment for the Arts to consider "decency" and "respect for the diverse beliefs and values of the American public" when awarding grants). When the government is subsidizing or assisting speech, rather than regulating or prohibiting speech, it has more latitude to use discretionary criteria, and it may decide that racial offensiveness (as opposed to other forms of offense) is in a class by itself. *See id.* at 587–88. The National Endowment for the Arts might choose to withhold funding from racially offensive art without denying funding to every work of art that might offend someone on religious or other grounds. In like manner, the Board may decline to engrave the confederate battle flag on state license plates without triggering an obligation to cancel the "Choose Life" or "One State Under God" plates.

C. Finally, the court of appeals improperly rejected the State's defense that it had not issued *any* specialty

plates expressing *any* viewpoints on the confederacy or confederate battle flag—and therefore could not be found guilty of "viewpoint discrimination" for rejecting the respondents' specialty-plate design. The court of appeals reasoned that there was no evidence showing that the Board *would* exclude all points of view on the confederate battle flag. Pet. App. 22a. But the respondents must show that the Board is *currently engaged* in viewpoint discrimination, and they cannot make this showing until the Board approves a license plate that disparages the confederacy or the confederate battle flag. It is impossible for the State to prove or even predict how future Boards will respond to future specialty-plate proposals. The current Board cannot bind its successors—any policy can be repealed—and no one knows the future makeup of the Board or the future statutes, regulations, or policies that will govern the Board's decisionmaking. For the court of appeals to demand such proof from the State improperly shifts the burden of proof away from the respondents.

The court of appeals also erred by declaring that it would be "equally objectionable" for the Board to exclude all viewpoints on the meaning of the confederate battle flag. *Ibid.*; *see also id.* at 23a ("Silencing both the view of Texas SCV and the view of those members of the public who find the flag offensive would similarly skew public debate and offend the First Amendment."). In doing this, the court of appeals conflated viewpoint discrimination with content discrimination, and declared a state guilty of "viewpoint discrimination" whenever it excludes any subject matter from its specialty license plate pro-

gram. *Id.* at 23a ("[A] state engage[s] in viewpoint discrimination when it denie[s] a specialty license plate based on the speaker's message").

The court of appeals followed the misguided reasoning of the Eighth and Ninth Circuits, which held that the Speech Clause *compels* States to issue "Choose Life" specialty plates—even when the State has never issued a specialty plate supporting abortion. *See Roach*, 560 F.3d at 870; *Ariz. Life Coal.*, 515 F.3d at 971–72. Each of those courts rejected the State's defense that it had chosen to stay out of the abortion debate altogether and had therefore committed only content or subject-matter discrimination, not viewpoint discrimination. *See Roach*, 560 F.3d at 867–70; *Ariz. Life Coal.*, 515 F.3d at 971–72. Both of those courts were wrong—and so is the court of appeals in this case. A State that has never issued *any* specialty license plate relating to topics such as abortion or the confederacy is not engaged in "viewpoint discrimination" when it declines a request to extend its specialty-plate program into that new subject matter. Unless the respondents can prove that the State would have approved a specialty plate expressing a different view on the untouched subject matter, then they cannot establish that the State has engaged in viewpoint rather than content discrimination.

* * * * *

The ultimate question in this case is whether Texas has "abridg[ed]" the respondents' "freedom of speech" by declining to sell them a specialty license plate engraved with the confederate battle flag. U.S. Const. amend. I. The answer is easy: No. The respondents enjoy

the same freedom to speak that they had before the specialty-plate program existed. And the respondents cannot complain that they have been forced to pay into a program that excludes them on account of their views. *See, e.g.*, *Rosenberger*, 515 U.S. at 824–27; *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). The added costs of producing specialty license plates are borne by the drivers who pay for them; none of those costs are passed on to taxpayers or shared with the respondents. *See* Tex. Transp. Code § 504.801(d).

In light of all of this, the respondents cannot show that their "freedom of speech" has been "abridg[ed]." Even the respondents would acknowledge that a State that refuses to establish a specialty-license-plate program has not "abridg[ed]" anyone's freedom of speech. Yet the only difference between the respondents and the residents of that hypothetical State is that Texas gives the respondents *more* choices for the messages and designs that can appear on their license plates. The respondents may not be happy with the choices that they have been offered, but they cannot maintain that Texas has *abridged* their freedom of speech by *increasing* the choices available to those who want a state-sponsored message to appear on their license plates. *See* Webster's Third New International Dictionary 6 (2002) (defining "abridge" to mean to "deprive" and "to diminish (as a right) by reducing").

In the end, the respondents cannot escape the fact that they are fighting the words of the First Amendment. The "freedom of speech" does not give anyone a right to commandeer the machinery of government to

support his or her desired message. And the government-speech doctrine ensures that the First Amendment will never be used toward those ends.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Can a state establish a program for private individuals, non-profit organizations, and businesses to design specialty license plates, and then deny access to an eligible non-profit organization because the organization's logo featuring the Confederate battle flag "might be offensive to any member of the public"?

2. Can a state honor the history of the Confederacy and Confederate soldiers through public monuments and state holidays but not allow a non-profit organization to express the same message on specialty license plates?

CORPORATE DISCLOSURE STATEMENT

Texas Division, Sons of Confederate Veterans, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The other Respondents are individuals.

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STATEMENT OF THE CASE

Every year the State of Texas celebrates Confederate Heroes Day, an official state holiday, on January 19th. There are multiple monuments at the Texas Capitol honoring Confederate soldiers. In the floor of the rotunda of the Texas Capitol is a symbol representing the time when Texas was part of the Confederacy. In the Texas Capitol gift shop you can buy replica Confederate currency and miniature Confederate flags. In all this, the State of Texas demonstrates a policy of honoring Texas's history as a part in the Confederacy and of honoring Confederate soldiers. Despite this policy, the Texas Department of Motor Vehicles Board ("DMVB") denied Respondents' application for a specialty plate honoring Confederate veterans, stating that the message was offensive, despite the fact that the State of Texas currently expresses the same message every day. There is no record of any other specialty plate application ever being denied by the DMVB.

Specialty license plates are either (a) created by the legislature by specific legislation[1] or (b) designed by private individuals, non-profits, and businesses who submit their applications to the Texas Department of Motor Vehicles ("DMV") directly or through a

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[1] *See* Tex. Transp. Code §§ 504.601, 504.602-504.662. Some examples of plates made available by statute in Texas include "Animal Friendly," "Keep Texas Beautiful," "Texas Reads," and a Daughters of the Republic of Texas plate that reads "Native Texan." Tex. Transp. Code §§ 504.602, 504.605, 504.616, 504.637.

third-party vendor under contract with the State.[2] People and organizations who want to have a specialty plate create a proposed plate and request approval of the design. A committee of the DMV approves the design, but people who want to display the design on their vehicle choose the plate, pay the extra cost, and normally install them on their vehicle. These people then publish the message when they drive their vehicle in public.

There are more than 350 messages to choose from. The list includes approximately 232 messages chosen by the Texas Legislature and another approximately 174 approved by the Texas Department of Transportation ("TxDOT") or DMVB through application directly to the state agency or through My Plates, the official third-party vendor. The DMV's brochure explains the three ways "to get your specialty license plate on the road."[3]

Some of the specialty plates available to Texas drivers are: Choose Life, Calvary Hill ("One State Under God"), God Bless Texas, Knights of Columbus

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[2] Non-profit organizations can send their application directly to the DMV, but individuals and for-profit businesses must submit their applications through the third-party vendor who helps facilitate and market specialty plates. *See generally* Joint Appendix ("App.") 67.

[3] App. 67. The brochure makes it clear to Texans that the message is theirs. A "Frequently Asked Question" is "Who provides the plate design?" The answer, "You do, though your design is subject to reflectivity, legibility and design standards." *Id.*

("One Nation Under God"), Buffalo Soldiers, Insure Texas Kids, Boy Scouts, Girl Scouts, Texas Masons, Texas Lions Camp, Rotary International, March of Dimes, Be a Blood Donor, College for All Texans, Enduring Freedom, Fight Terrorism, Korea Veterans, Vietnam Veteran, Former Prisoner of War, Woman Veteran, World War II Veterans, Mothers Against Drunk Driving, NASCAR, Operation Iraqi Freedom, Pearl Harbor Survivor, Organ Donor, Rather Be Golfing, Read to Succeed, Stop Child Abuse, Texas It's Like a Whole Other Country, United We Stand, World Wildlife Fund, University of Alabama, University of Arizona, University of Arkansas, University of Georgia, University of Illinois, University of Kansas, University of Kentucky, University of Louisiana, University of Mississippi, University of Missouri, University of Nebraska, University of Oklahoma, University of South Carolina, University of Tennessee, Notre Dame, Oklahoma State University, Re/Max, Dr. Pepper, Mighty Fine Burgers, Master Gardener, Share the Road, YMCA, Young Lawyers Association, Texas State Rifle Association, Texas Trophy Hunters Association, and Animal Friendly.[4]

The Fifth Circuit opinion accurately describes Texas Sons of Confederate Veterans' ("Texas SCV's") application for a specialty license plate and the "tortured procedural history" at TxDOT and the

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[4] See examples included at App. 66. *See also* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates, last visited 9/25/14.

DMVB.[5] The plate was initially approved by a simple majority vote.[6] Despite the absence of any procedural basis for taking another vote, a second vote was conducted and the plate was rejected.[7] Texas SCV then reapplied with the DMVB, which deadlocked four to four in two votes and then ultimately denied the plate unanimously after an impassioned public hearing.[8]

At the same hearing, the DMVB approved a Buffalo Soldiers plate by a five to three vote, despite the fact that Land Commissioner Jerry Patterson, who sponsored both the Texas SCV and the Buffalo Soldiers plates, told the DMVB at the hearing that he

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[5] Pet. App. 3a-5a, 18a-19a.

[6] The committee at TxDOT in charge of approving specialty plates at the time initially approved the plate by a simple majority vote. App. 52. But the Director of the Vehicle Titles and Registration Division maintained that the plate did not pass and suggested that Texas SCV be notified that its application was rejected. App. 51. In response, another board member emailed the following: "Since it is now documented that we had a quorum and that the plate passed by a simple majority. I don't think we can just declare a no pass. An open records request would expose the vote and we will be shown as biased. I believe we should follow the procedures and let the public decide!" App. 50. Upon the Director's insistence that there be a re-vote based upon the "controversial" nature of the plate, a re-vote was conducted, and the plate was rejected. *See* App. 53. There is no evidence of a valid procedural basis for the committee ignoring the initial majority vote.

[7] *See* App. 53.

[8] App. 45-46, ¶¶ 17, 20; App. 59-60.

had had conversations "with a group of Indians, who were offended by the Buffalo Soldier plate."[9]

In its written rejection of Texas SCV's application for a specialty plate, the DMVB stated:

> The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.[10]

The Board cited a provision of the Texas Transportation Code which provides, in part, that the Board "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code § 504.801(c).

Following the denial of its application for a specialty plate, Texas SCV filed the underlying lawsuit challenging the DMVB's decision as unconstitutional under the First and Fourteenth Amendments to the Constitution.

The district court granted the DMVB's motion for summary judgment and denied Texas SCV's motion for summary judgment. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, No. A-11-CA-1049-SS,

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[9] USCA5 377; USCA5 451.

[10] App. 64.

2013 WL 1562758 (W.D. Tex. Apr. 12, 2013). The court held that the specialty plates implicated private speech concerns but found no viewpoint discrimination. *Id.* The Fifth Circuit reversed and remanded, holding that the specialty plates were private speech and the State engaged in viewpoint discrimination in denying Texas SCV's specialty plate. *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014).

SUMMARY OF THE ARGUMENT

The Texas government honors Confederate veterans every year on January 19th, which is an official state holiday known as Confederate Heroes Day. Texas also honors Confederate veterans with memorials on the grounds of the Texas Capitol, and sells replica Confederate currency and depictions of the Confederate flag at the Capitol gift shop and online. The State apparently does not believe that the "message" of the Confederate flag is offensive to the public, or, if it is offensive, the State certainly does not shy away from its expression because of such offense.

Yet, when the Texas SCV sought to express the same message as the State, the DMVB rejected their application on the basis that it "might be offensive to any member of the public." The record is silent as to any other organization whose application for a specialty plate has ever been denied.

The messages on some plates are designed by the Texas Legislature. There are more than two hundred specialty plates available that were proposed in bills by a representative of Texas government, reviewed and passed by vote in both the Texas House and Senate, and signed by the Governor of Texas. In contrast, at issue in this case, are the other nearly two hundred plates that are designed by individuals, non-profits, or for-profit businesses who apply to a state agency (or official third-party vendor) to create a plate. For these plates, the design, from beginning to end, is in the hands of non-state actors. Individuals, non-profits, or businesses design the message for a plate, the DMVB approves or rejects the plate – there is no evidence in the record of the DMVB ever rejecting any other plate – then a driver chooses to convey the message expressed, purchases the plate, affixes it to his or her car, and drives onto the public roadway. No speech would occur but for a private individual, non-profit, or business designing the message and the driver attaching his or her chosen plate to the bumper and exiting his or her driveway.

This Court held in *Wooley v. Maynard,* 430 U.S. 705 (1977) that messages on license plates, even "standard issue" messages like state mottos, implicate the First Amendment rights of the driver. In other words, messages on license plates are private speech. Every circuit court of appeals to address the type of specialty plate at issue here (those designed by non-profit organizations) have held that the specialty plates implicate private speech and the First

Amendment applies. Nothing prohibits the State from speaking in the same forum as individuals, non-profits, and businesses, and when the State speaks it does so by passing specific legislation. Perhaps it may be considered "government speech" when the State passes legislation creating a specific specialty plate, but that is not at issue in this case.

The government speech cases relied on by the DMVB are not dispositive and are easily distinguishable. While public monuments have long been associated with speech of the government, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009), messages on license plates are readily associated with the owner of the vehicle. *See Wooley*, 430 U.S. at 717, n. 15. Public monuments are permanent, while a message on a passing vehicle is fleeting, and specialty plates must be renewed annually. In the case of monuments, the government has final approval authority on whether the speech will occur; in the case of specialty plates, no speech occurs until and unless a driver purchases a specialty plate and drives onto a public roadway, knowing that he or she will be identified with the message expressed. Finally, the specialty plate forum is not like a public park where "accommodating a large number of public speakers [would] defeat the essential function of the land or the program." *Summum*, 555 U.S. at 478.

Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005), is also distinguishable because the beef promotion message in that case was "established by the Federal Government." In contrast, for the specialty

plates at issue here, the message is designed only by the individuals, non-profits, or businesses who apply for plates and is only carried out by drivers who choose to put that message on their cars and thereby choose to be associated with the message. In contrast to *Johanns* and *Rust v. Sullivan*, 500 U.S. 173 (1991), there is no singular "programmatic message" of the Texas specialty license plate program that would constitutionally prohibit the Texas SCV plate. If there is any "programmatic message" at all, it is that Texans should freely express themselves on specialty plates and thereby raise money for the sponsoring state agency, the general highway fund, and/or the non-profit organization.

Because specialty plates designed by private parties and published by private parties are private speech, the First Amendment applies and restrictions on speech must be viewpoint neutral. The DMVB denied Texas SCV's application for a specialty plate for one reason – because the plate "might be offensive to any member of the public." This "potential offensiveness" standard is not a constitutionally valid standard and is a recipe for viewpoint discrimination. When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The DMVB gave its imprimatur to the viewpoint that the Confederate battle flag is a symbol of racism, and discriminated against those who view the flag as a historic symbol of the Confederate soldier's sacrifice, independence, and Southern heritage. The DMVB's decision is truly

ironic considering the State of Texas expresses the same viewpoint as Texas SCV every day of the year through its legislation and monuments honoring Confederate soldiers.

ARGUMENT

I.

THE ONLY "GOVERNMENT SPEECH" ABOUT CONFEDERATE SOLDIERS IS THE MONUMENTS AND LEGISLATION HONORING THEM.

Although the State only manufactures the plates and does not create the content or publish the content, the DMVB argues that its approval of the message makes the message government speech and not the speech of the organization that proposed the message or the person who purchases and displays the license plates on his or her vehicle. The irony is that the State endorses Texas SCV's message every day and has an apparent state policy of honoring Confederate veterans and commemorating Texas's role in the Confederacy.

January 19th is an official Texas holiday known as Confederate Heroes Day.[11] Texas used to celebrate both Robert E. Lee's birthday and Jefferson Davis's

[11] Tex. Gov't Code § 662.003(b)(1) (designating January 19th "'Confederate Heroes Day,' in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes.").

birthday, but the holidays were combined into one "Confederate Heroes Day" in 1973 by legislation.[12] On this day, it is not unusual to find people dressed in Confederate period attire near the steps of the Texas Capitol.[13] In addition, there are three permanent monuments to Confederate soldiers on the Capitol grounds: the Confederate Soldiers monument; the Terry's Texas Rangers monument; and the Hood's Brigade monument. *Van Orden v. Perry*, 545 U.S. 677, 706 Appendix B (2005) (BREYER, J., concurring) (photocopy of the Texas Capitol Monument Guide).[14] Inside the Capitol building, on the floor under the rotunda, is an emblem symbolizing Texas's role in the Confederacy.[15] At the visitors' gift shop in the Capitol, visitors can purchase miniature Confederate flags, posters with the same Confederate flag, and even replica Confederate currency.[16] Near the Capitol is the John H. Reagan State Office Building. *Van Orden*, 545 U.S. at 706 Appendix B (2005) (BREYER, J.,

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[12] *See* http://www.tsl.texas.gov/ref/abouttx/holidays.html (last visited 1/23/2015). Robert E. Lee's birthday is January 19th.

[13] *See* http://www.myfoxaustin.com/story/24511951/robert-e-lee-remembered-at-capitol (last visited 1/23/2015).

[14] *See also* http://www.tspb.state.tx.us/SPB/Gallery/MonuList/MonuList.htm (last visited 1/27/2015). Hood's Texas Brigade was an infantry brigade that fought in the battle of Gettysburg. Terry's Texas Rangers was a volunteer cavalry unit from Houston that fought in the Civil War.

[15] *See generally* http://www.tspb.state.tx.us/SPB/Gallery/SigSpace/rot_sm.htm (last visited 1/23/2015).

[16] *See* http://www.texascapitolgiftshop.com/ (last visited 1/23/2015).

concurring). John H. Reagan served as the Postmaster General for the Confederate States of America.[17]

When the State has spoken at all about Confederate soldiers or the Confederacy, it has expressed the same message as Texas SCV – it has honored the Confederate soldiers and commemorated Texas's role in the Confederacy. In this context, the DMVB's argument that the State can reject the Texas SCV plate because Texas SCV's message is offensive is ludicrous.

II.

THE SPECIALTY PLATES AT ISSUE HERE ARE PRIVATE SPEECH.

The specialty plates at issue here are either private speech or government speech. This is a matter of first impression in this Court. If they are private speech, the DMVB cannot discriminate based on viewpoint, and offensiveness is an impermissible standard. If they are government speech, the government is free to say whatever it wants, subject to the Establishment Clause, but is not constrained by the Free Speech Clause.

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[17] *See* http://en.wikipedia.org/wiki/John_Henninger_Reagan (last visited 1/23/2015).

A. TWO CATEGORIES OF SPECIALTY PLATES: THOSE DESIGNED BY STATE LEGISLATURE, AND THOSE DESIGNED BY PRIVATE PARTIES.

There are two categories of specialty plate programs.[18] First, there are specialty plates created by specific individual enabling legislation. Each of these plates was proposed in a bill by a representative of the Texas government, reviewed and passed by both the Texas House and Senate, and signed by the Governor of Texas. For example, the 78th Texas Legislature passed a bill requiring the DMV to "issue specialty license plates including the words 'Read to Succeed.'" Tex. Transp. Code § 504.607. In this first category, the message is designed by the government.[19]

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[18] Specialty plates allow Texans to express themselves in the areas of their license plates surrounding the sequence of alpha-numeric characters. Vanity plates, which were made available before specialty plates, allow Texans to choose specific alpha-numeric characters to express themselves instead of merely being assigned a random combination of characters. For an extra fee, drivers can choose to purchase a specialty plate and also personalize the alpha-numeric characters. *See generally* http://myplates.com (last visited 1/28/2015).

[19] Other specialty plates designed by the Texas Legislature include Keep Texas Beautiful, State of the Arts, Animal Friendly, Special Olympics Texas, Texas YMCA, Go Texan, Share the Road, Daughters of the Republic of Texas "Native Texan," Knights of Columbus, Texas Music, Smile Texas Style, Fight Terrorism, God Bless Texas, God Bless America, March of Dimes, Master Gardener, Boy Scouts of America, Insure Texas

(Continued on following page)

Second, there are specialty plates designed by private citizens, non-profit organizations, and businesses. This case involves specialty plates in this second category. Private individuals and organizations design a message and apply to a state agency, such as the DMV, or to a private vendor authorized by the state, to have their own designs published on specialty license plates.[20] In this case, there is no evidence of the DMVB rejecting any application for a specialty plate except for the Texas SCV plate.

B. DRIVERS CONTROL WHETHER ANY "SPEAKING" OCCURS.

Regardless how the message on a specialty plate is authored, no speech occurs until drivers choose messages they endorse, purchase the plates, affix them to the bumpers of their cars, and exit their driveways onto a public road. The act of speaking is thus entirely controlled by the driver. If no driver purchases a "Read to Succeed" plate, that message is

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Kids, and Choose Life. *See generally* Tex. Transp. Code § 504.602 *et seq*.

[20] Some specialty plates designed by citizens, non-profit organizations, and businesses include Calvary Hill "One State Under God," American Quarter Horse Association, Buffalo Soldiers, LSU Alumni, Fort Worth Zoo, Freebirds, Ignite Steam Energy, Dr. Pepper, Mighty Fine Burgers, NASCAR, National Wild Turkey Federation, Rotary International, Texas Masons, Texas Realtors, RE/MAX, Rather Be Golfing, and World Wildlife Fund. *See generally* http://myplates.com (last visited 1/23/2015).

never expressed in the license plate forum. The message is either authored by the State itself (e.g., "Read to Succeed") or by a private individual or organization (e.g., the Calvary Hill plate with "One State Under God"), then it is printed by the State onto a license plate, and ultimately published – if it is ever published – by the driver who wants to express that message. The driver has absolute control over whether to express any message through a specialty plate and, if so, which message to express. Without the driver's expressive conduct, no speech would occur.

In the case of plates designed by individuals, non-profit organizations, and businesses, private citizens or organizations both design the message and engage in the actual dissemination of the message. The government, in etching the message on a license plate, is only a printer; the private parties conceive of and publish the messages expressed.[21]

C. *SUMMUM* AND OTHER GOVERNMENT SPEECH CASES DO NOT CONTROL THIS CASE.

The government speech doctrine is newly minted, and its rough contours have been described in only a

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[21] Further illustrating that the driver is the publisher of any message on a specialty plate, the State is constitutionally forbidden to compel drivers to express a message on their license plate that they disagree with. *Wooley v. Maynard*, 430 U.S. 705 (1977). Drivers have ultimate control over publishing a message via license plate.

few cases. *See generally Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). These cases do not dictate a finding here that specialty plates designed by non-profit organizations, businesses, or private individuals are government speech.

In *Summum* the Court held that placing donated permanent monuments in a public park was government speech, and Pleasant Grove City was not constitutionally required to accept a permanent monument proposed by Summum, a religious organization.[22] 555

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[22] Four of the justices in *Summum* expressed concern or caution about overextending the newly minted "government speech doctrine." *See id.* at 481 (STEVENS, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. The Court's opinion in this case signals no expansion of that doctrine." (Citation omitted.)); *Id.* at 484 (BREYER, J., concurring) ("[T]he 'government speech' doctrine is a rule of thumb, not a rigid category. . . [C]ourts must apply categories such as 'government speech' . . with an eye toward their purposes – lest we turn 'free speech' doctrine into a jurisprudence of labels. . . Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective."); *Id.* at 485-87 (SOUTER, J., concurring) ("Because the government speech doctrine . . . is 'recently minted,' it would do well for us to go slow in setting its bounds. . . . To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.").

U.S. 460 (2009). Although the Court did not articulate a bright line test to determine in all instances whether speech is private or government speech, it considered the following in its analysis of whether privately donated monuments were private or government speech: (a) whether the speech is permanent or transitory; (b) whether the speech is "closely identified in the public mind with the government," or, in other words, whether the speech is "meant to convey and [has] the effect of conveying a government message"; and (c) whether the government "effectively control[s]" the message by exercising "final approval authority." *Id.* at 464, 472, 473. Speech that is permanent, as opposed to transitory, has a message that is closely identified with the government, and over which the government has final approval authority may be government speech. Further, the Court considered whether "accommodating a large number of public speakers [would] defeat the essential function of the land or the program." *Id.* at 478. In the case of a public park, the answer is clear; accepting all privately donated monuments could result in a park cluttered with monuments and unusable for its essential function, and thus monuments in a public park are properly considered government speech.

Summum is not dispositive of this case. In contrast to a permanent monument in a public park, a message on a specialty plate is transitory. The message is only expressed to passersby on public roadways, and the plate itself has to be renewed annually. While "[g]overnments have long used monuments to

speak to the public," *id.* at 470, messages on specialty license plates are closely identified not with the government, but with the driver of the car. In fact, the entire success of the specialty plate (and vanity plate) program depends on the fact that the messages expressed are identified with the driver, whether the plate is a vanity plate stating "BARFLY" or a specialty plate indicating the driver supports the Buffalo Soldiers. The message on a license plate is "closely identified in the public mind" with the driver even when every license plate bears the same message. *Id.* at 472; *Wooley v. Maynard,* 430 U.S. 705, 717 n. 15 (1977).

While the DMVB argues that the State "effectively controls" the message by exercising "final approval authority" over proposed specialty plates, there is no evidence in the record that the DMVB has ever exercised such control.[23] There is no evidence that any proposed specialty plate other than Texas SCV's has been rejected. Further, although approval by the DMVB is a nominal step required to get a specialty plate on the road, it is ultimately the individual driver who exercises final approval authority. If no driver wants to express the message on the specialty plate, no speech ever occurs.

Finally, "accommodating a large number of public speakers" does not "defeat the essential function of

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[23] Of course the DMVB has no control of or say in hundreds of license plates the content of which are mandated by Texas statute.

the [specialty plate] program." There are already more than 350 specialty plates available to Texas drivers, and the number of different specialty plates that could be on the road is only limited by the number of vehicles registered in Texas. The "essential function" of the specialty plate program is to encourage as many drivers as possible to purchase the more expensive specialty plates and thereby raise money for the sponsoring state agency, the general highway fund, and/or the non-profit organization.[24]

Other "government speech" cases are also not dispositive of this case. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Court held that the promotional campaigns implemented by the Secretary of Agriculture pursuant to the Beef Promotion and Research Act of 1985 were government

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[24] The DMVB now takes the position that the type of plate sought by the Texas SCV is not a revenue-generating venture for the State. Pet. Br. at 22. This is a new argument. The DMVB took the exact opposite position in the district court, stating in its motion to dismiss Texas SCV's complaint, "With respect to the specialty plate type at issue here – i.e., a plate issued as a result of an application by a non-profit entity made directly to the Board – the majority of the revenue generated by the plate fee ($22 per plate) is either deposited in the state's general revenue fund for the benefit of the sponsoring state agency or, if no agency has sponsored the plate, the revenue is deposited in the state highway fund. *See* Tex. Transp. Code § 504.801(e)." Def. Mot. to Dismiss Pl. First Am. Compl., USCA5 157. *See also* Specialty License Plate Revenue, available online at http://www.txdmv.gov/reports-and-data/doc_download/673-specialty-license-plate-revenue (last visited Jan. 26, 2015) (spreadsheet showing $171 million total revenue for all plates from 1994-2012).

speech. Although the campaigns were designed by a board in which only half of the members were appointed by the Secretary, "the message set out in the beef promotions is from beginning to end the message established by the Federal Government." *Id.* at 560.

> Congress has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." 7 U.S.C. §§ 2901(b), 2902(13). Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, *see, e.g.*, § 2904(4)(B)(i) (campaigns "shall take into account" different types of beef products), and what they shall not, *see, e.g.*, 7 CFR § 1260.169(d) (2004) (campaigns shall not, without prior approval, refer "to a brand or trade name of any beef product"). Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well). All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and

> participate in the open meetings at which proposals are developed.

Id. at 561 (citations omitted).

In contrast, the specialty plates at issue here are "from beginning to end" messages that are (1) designed by private individuals, non-profits, or businesses and (2) published by drivers who choose to convey the message. The Texas Transportation Code does not "specify, in general terms" what messages these types of specialty plates will contain. There is no "overarching message" set out by the Texas Legislature that citizens are trying to convey. Instead, the messages expressed are the citizens' own messages.[25] There is no evidence in the record of the DMVB ever rejecting or rewriting a proposed specialty plate, and certainly the DMVB does not "attend and participate in the meetings" at which individuals, non-profits, and businesses develop proposed messages.

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[25] Certainly the State can also express itself in the specialty license plate forum. The State has designed many license plates, specifying the words and sometimes images that are to be included. *See* Tex. Transp. Code § 504.602 *et seq.* But specialty plates designed by the State legislature are not at issue here. Further, even those types of plates are not published, and no "speaking" is done, until a Texas driver endorses that message, purchases the plate, and takes their "mobile billboard" on a public road. *Johanns*, 544 U.S. at 557 (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

D. THE CASES, CITED BY THE DMVB, ABOUT SPEECH-RELATED RESTRICTIONS IN ACCEPTING GOVERNMENT FUNDING ARE ALSO UNAVAILING.

The DMVB argues that, under *Rust v. Sullivan*, 500 U.S. 173 (1991), the specialty license plate system is a "government program" and the government can therefore control what content is or is not expressed. *Rust* is a compelled speech or subsidized speech case and is not analogous to this case. More importantly, there is no "programmatic message" that prevents the Texas SCV plate from being approved.[26]

At issue in *Rust*, in part, were restrictions on recipients of family planning funding, issued pursuant to Title X of the Public Health Service Act of 1970, which prevented them from encouraging, promoting, advocating, or counseling the use of abortion as a method of family planning. *Rust* argued that the regulations violated the First Amendment by prohibiting all discussion about abortion between health care providers and their patients. The Court held that the restrictions were constitutional because "when [the Government] chooses to fund a program dedicated to advance certain permissible goals the program in advancing those goals necessarily

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[26] To the extent not issuing a plate that "might be offensive to any member of the public" could possibly be considered a "programmatic message," it is unconstitutional. *See infra*, Section IV.

discourages alternative goals." *Id.* at 194. The restrictions in Title X funding did not result in "a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194-95.

Rust is unavailing to the DMVB because there is no evidence that a plate about the Confederacy or Confederate soldiers, or any plate proposed by the Texas SCV, was ever "specifically excluded from the scope of the [specialty plate] project" by statute or regulation. The DMVB cannot cite any statute, legislative history, or anything in the record limiting the scope of the specialty plate program in a way that would exclude Texas SCV's plate.[27] Unlike Title X, which specifically stated that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning," there is nothing in the specialty plate statute that would prevent Texas SCV from getting a plate. The specialty plate program is designed to expand speech and the State's coffers by allowing individuals, non-profits, and businesses to design specialty plates. Approving Texas SCV's plate would further the purpose of the program, not run counter to it.

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[27] In fact, the only statute or unqualified State conduct regarding the Confederate veterans is the Confederate Heroes Day statute and the various public monuments specifically honoring Confederate veterans.

Further, the DMVB, in rejecting Texas SCV's plate, stated it was rejected because it "might be offensive to any member of the public" and made absolutely no mention of any programmatic message.

In this way, this case is clearly more akin to *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) then *Rust*. In *Legal Services Corporation* the Court held that a restriction prohibiting local recipients of Legal Services Corporation funds from challenging welfare laws was unconstitutional. *Id.* at 549. The Court noted that, unlike the program in *Rust*, "There can be little doubt that the LSC Act funds constitutionally protected expression; and in the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id.* at 548. Similarly, the specialty plate program is designed to promote the free expression of the individuals, non-profits, or businesses that design plates, and the drivers who become mobile billboards for the message. There is no programmatic message in the specialty plate statute or regulations that would constitutionally prevent Texas SCV from getting a plate.

The DMVB strangely declares that speech "that appears on" a license plate is within the scope of the "program" and speech that "appears elsewhere on a vehicle is outside the program." Pet. Br. at 18-19. Perhaps that is true, but it means nothing. Even if the *Rust* analysis were relevant to deciding this issue,

Texas SCV's proposed plate is clearly within the "scope of the program," as the DMVB defines it, because the program involves speech on a license plate and Texas SCV is seeking to have speech on a license plate. The key distinguishing fact – ignored by the DMVB – is that there is no programmatic message that would constitutionally exclude Texas SCV from getting a specialty plate.

E. THIS COURT RECOGNIZED IN *WOOLEY V. MAYNARD* THAT LICENSE PLATES IMPLICATE THE DRIVERS' PRIVATE SPEECH INTERESTS.

This Court has never addressed whether specialty plates are "government speech" or "private speech," in those terms, but has affirmatively answered the question whether messages on a license plate are the speech of the driver. In *Wooley v. Maynard*, 430 U.S. 705 (1977), a majority of the Court recognized that messages on license plates are "readily associated" with the driver and implicate the driver's free speech rights.[28] The issue was "whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto 'Live Free or Die' on passenger vehicle license plates because the motto is repugnant to their moral and religious beliefs." *Id.* at 706-07. The Maynards were

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[28] *See also Johanns*, 544 U.S. at 579, n. 9 (SOUTER, J., dissenting) (describing the drivers in *Wooley v. Maynard* as the "speakers" forced to communicate the state motto).

Jehovah's Witnesses who did not want to express the state motto. In holding that it was unconstitutional for the State to "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," the Court implicitly recognized that messages on license plates are the driver's speech. *Id.* at 713. The Court did so even though "Live Free or Die" was a message designed by New Hampshire and published on every license plate registered in the state. Even though a fully informed observer would arguably understand that the "Live Free or Die" motto was state motto and did not necessarily reflect the views of the Maynards, this Court was careful to protect the rights of drivers to speak – or refuse to speak – through messages on their license plates. The Court noted that, unlike a motto incorporated into a state seal or other symbol that may be required on official documents, the purpose of a message on a license plate is "to advertise the message it bears." *Id.* at 715, n. 11. Indeed, a license plate is akin to a "mobile billboard," and a driver is a "courier for such message" expressed on the license plate. *Id.* at 715, 717. Similarly, the Court noted, messages on license plates are different from messages on coins and currency (like "In God We Trust"), because "currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator." *Id.* at 717, n. 15. The Court found that the State had no countervailing interest sufficiently compelling to justify requiring

the Maynards to display the state motto on their license plates. *Id.* at 716.

If messages on license plates were merely government speech, the Free Speech Clause would not have been implicated in *Wooley*, and the case would have come out differently: the Court would have endorsed the criminal sanctioning of the Maynards for covering up the state motto.

F. EVERY CIRCUIT COURT OF APPEALS TO ADDRESS THE TYPE OF SPECIALTY PLATE AT ISSUE HERE HAS HELD THAT THE FIRST AMENDMENT APPLIES AND STATE REGULATION MUST BE VIEWPOINT NEUTRAL.

Every circuit to address the type of specialty plate program at issue here – specialty plates designed by individuals, non-profit organizations, and/or for-profit businesses pursuant to a program for private parties to apply for plates, as opposed to specialty plates designed by state legislatures through individual legislation – has held that specialty plates implicate private speech concerns and that government regulation of those plates must comply with the First Amendment. *See Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 555 U.S. 815 (2008) (Arizona's "special organization license plate program" was primarily private speech and restrictions had to be viewpoint neutral); *Roach v. Stouffer*, 560 F.3d 860

(8th Cir. 2009) (Missouri's organizational license plate program held to be private speech of the organization and the vehicle owner); *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014). Including the Fifth Circuit, there have now been three circuit courts of appeals to address the type of specialty plates at issue here, and each one of them has concluded that the specialty plates at issue in this type of program implicate private speech and the state's regulation of them must be viewpoint neutral.

G. SPECIALTY PLATES DESIGNED BY THE LEGISLATURE MAY BE GOVERNMENT SPEECH, BUT PLATES DESIGNED BY PRIVATE INDIVIDUALS, BUSINESSES, AND NON-PROFITS ARE NOT.

With regard to specialty plates designed by the state legislatures, the Sixth Circuit held that a "Choose Life" plate created by legislative enactment was government speech. *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375 (6th Cir. 2006), *cert. denied*, 434 U.S. 1070 (2006) ("Choose Life" plate was government speech because "the Act determines the overarching message and Tennessee approves every word on such plates."). The Fourth Circuit reached the opposite conclusion on similar facts in 2014, holding that North Carolina *did* violate the First Amendment in creating a "Choose Life" plate while not offering a pro-choice plate. *American Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563,

576 (4th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3076 (July 11, 2014) (No. 13A1140, 14-35) ("Because the specialty plate speech at issue implicates private speech rights and is not pure government speech, North Carolina's authorizing a 'Choose Life' plate while refusing to authorize a pro-choice plate constitutes viewpoint discrimination in violation of the First Amendment.").[29]

It is certainly possible for the State to join private parties and express itself in the specialty license plate forum. Indeed, the Texas Legislature has passed legislation authorizing many specific specialty license plates.[30] These specialty plates certainly have more elements of government speech than plates designed by private parties, because the Texas Legislature passed legislation creating the message on the plates. Still, the driver has ultimate control over whether the message is published and any speech actually occurs.

While these cases present interesting legal issues, they are not applicable to the present case, which involves specialty plates designed by private parties, not state legislatures. All cases to consider specialty plates designed by private parties have found them to implicate private speech concerns.

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[29] *See* Petition for a Writ of Certiorari, No. 14-35, *Berger v. American Civil Liberties Union of N.C.* (July 11, 2014).

[30] *See* footnote 19, *supra*.

III.

THE STATE COMMITTED VIEWPOINT DISCRIMINATION IN REJECTING TEXAS SCV'S PLATE.

When the government opens up a forum for private citizens to speak, such as the State did when it created the specialty plate program at issue, the government cannot distinguish among potential speakers based on the speakers' viewpoints. *See, e.g., Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Once it has opened a limited forum the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . nor may it discriminate against speech on the basis of its viewpoint. ") (internal quotations and citations omitted).

It is undeniable that the Confederate battle flag is a symbol that evokes passionate viewpoints, both in favor and in opposition. As a Georgia district court observed:

> [T]here is no consensus today, almost forty years after the [adoption of a state flag containing the Confederate battle flag] by the [Georgia] General Assembly, on its meaning.

> There are citizens of all races who view the flag as a symbolic acknowledgement of pride in Southern heritage and ideals of independence. Likewise, there are citizens of all races who perceive the flag as embodying principles of discrimination, segregation, white supremacy, and rebellion.

Coleman v. Miller, 912 F. Supp. 522, 530 (N.D. Ga. 1996), *aff'd*, 117 F.3d 527 (11th Cir. 1997); *see also Briggs v. Mississippi*, 331 F.3d 499, 506 (5th Cir. 2003) ("It is common knowledge that public reaction to and the debate over the flying of the Confederate battle flag, or its being a part of a state flag, has been virtually exclusively in relation to its symbolism of the Confederacy and the valor of its troops and whether or to what extent this symbolism extols or excuses slavery, racial oppression or resistance to racial equality.").

The discussion that arises about the Confederate flag is exactly the sort of robust debate that is protected by the First Amendment, and the State may not discriminate against speakers in that debate on the basis of their viewpoint. *See Denno v. School Bd. of Volusia Cnty.*, 218 F.3d 1267, 1285 (11th Cir. 2000) (FORRESTER, J., concurring and dissenting in part) ("The Confederate battle flag itself is a catalyst for the discussion of varying viewpoints on history, politics and societal issues. Discourse on such issues, without the fear of undue government constraint or retaliation, is exactly what the First Amendment was designed to protect."). That there is controversy

surrounding the Confederate flag shows that it is a symbol that should be a topic for open debate, without the government censoring one side or the other.

When the DMVB rejected Texas SCV's plate, it entered into the debate over the flag's meaning and endorsed a particular viewpoint. The DMVB gave its imprimatur to the viewpoint that the Confederate battle flag is a symbol of racism, and discriminated against those who view the flag as a historic symbol of the soldier's sacrifice, independence, and Southern heritage. The DMVB's rejection of the Texas SCV plate constitutes impermissible viewpoint discrimination prohibited by the First Amendment.

The DMVB argues that the Seventh Circuit's holding in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009), means that the State did not commit viewpoint discrimination because it "has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans." Pet. Br. at 46. Under the Seventh Circuit's rationale, Petitioners argue, there is no viewpoint discrimination under the present facts because Texas has not issued any plates pro- or anti- Confederacy. Pet. Br. at 51-52.

In *Choose Life Illinois*, a pro-life advocacy group sought a specialty plate, which in Illinois required a specific legislative enactment. The General Assembly failed to pass enabling legislation to create a "Choose Life" plate, and the advocacy group sued. The Seventh Circuit held that specialty license

plates implicated private speech but that the specialty plate forum was only a non-public forum. The court then concluded that Illinois had decided to exclude the entire subject of abortion, and thus the denial of the plate was content-based but viewpoint neutral. "It is undisputed that Illinois has excluded the *entire subject* of abortion from its specialty-plate program," the court held. *Id.* at 855 (emphasis original).

But this logic is not applicable to the Texas SCV plate.

First, there is no evidence that the State has purposefully eschewed issues related to the Confederacy or Confederate soldiers. In fact, the State's position is demonstrably the same as that expressed by Texas SCV. Texas SCV seeks to honor the Confederate soldiers and preserve the history of the Confederacy. As stated previously, the State does the same thing every day. January 19th is an official state holiday known as Confederate Heroes Day.[31] On the Texas Capitol grounds there are monuments honoring Confederate soldiers, including the Hood's Texas Brigade, Terry's Texas Rangers, and Confederate Soldiers monuments. *Van Orden v. Perry*, 545 U.S. 677, 706 Appendix B (2005) (BREYER, J., concurring) (photocopy of the Texas Capitol Monument Guide).[32]

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[31] Tex. Gov't Code § 662.003(b)(1) (designating January 19th "'Confederate Heroes Day,' in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes.").

[32] *See also*, http://www.tspb.state.tx.us/SPB/Gallery/MonuList/MonuList.htm (last visited 1/27/2015).

On the floor of the Capitol is an emblem of the Confederacy.[33] In the visitor's gift shop at the Capitol (or online), one can purchase posters and books commemorating the six flags that have flown over Texas (including the Confederate flag at issue here), replica Confederate currency, and various reproductions of the Confederate flag itself.[34] Near the Capitol is the John H. Reagan State Office Building. *Van Orden*, 545 U.S. at 706 Appendix B. Its namesake was Postmaster General of the Confederate States of America.[35] This is not a case where the State has a policy of avoiding the topic of the Confederacy or the Confederate flag. In fact, whenever the State has spoken about these topics, it has expressed the same message that Texas SCV seeks to express, one of commemorating the past and honoring the sacrifices of Confederate soldiers.[36]

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[33] *See generally* http://www.tspb.state.tx.us/SPB/Gallery/SigSpace/rot_sm.htm (last visited 1/23/2015).

[34] *See* http://www.texascapitolgiftshop.com/ (last visited 1/23/2015).

[35] See http://en.wikipedia.org/wiki/John_Henninger_Reagan (last visited 1/23/2015).

[36] Further, the State already has a wide variety of plates honoring veterans and veterans' descendants. There are specialty plates honoring the American Legion, Air Force Association, Air Force Cross recipients, Air Medal recipients, Armed Forces Reserve, Army Distinguished Service Cross recipients, Bronze Star medal recipients, Buffalo Soldiers, Civil Air Patrol, Coast Guard Auxiliary, Defense Superior Service Medal recipients, Desert Storm veterans, Disabled Veterans, Disabled Veteran – Surviving Spouse, Enduring Freedom veterans, Gold Star Family (honoring family members of soldiers who died while

(Continued on following page)

Second, the DMVB expressly rejected Texas SCV's plate because it was deemed "offensive," not because Texas was avoiding an issue raised by the Texas SCV plate. The DMVB's written denial says nothing about the State excluding an entire subject related to the Texas SCV plate (which would have been incorrect in any event). Tellingly, nowhere in this record is there any evidence that the State has purposefully eschewed the entire "issue" raised by the Texas SCV plate, however that issue may be defined.

Third, the specialty plate program in Illinois required a separate legislative enactment for every specialty plate. *Choose Life Ill.*, 547 F.3d at 855. It did not involve the same specialty plate program at issue here, where individuals, non-profits, and businesses could design plates and apply to the DMV. Because the legislature in Illinois had to authorize each plate, there was an element of legislative discretion and control that is absent from the private parties' specialty plate program in Texas.

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serving), Gold Star Spouse, Honorably Discharged, Korea Veterans, Navy Cross, Operation Enduring Freedom Afghanistan, Operation Iraqi Freedom, Pearl Harbor Survivor, Prisoner of War, Purple Heart Recipient, Texas National Guard, Texas Navy, U.S. Air Force, U.S. Army, U.S. Coast Guard, U.S. Marine Corps, U.S. Navy, U.S. Paratrooper, Vietnam Veteran, Woman Veteran, World War II Veterans, and others. *See generally* http://myplates.com, last visited 9/25/14; http://txdmv.gov/motorists/license-plates/specialty-license-plates (last visited 9/25/14); Tex. Transp. Code § 504.602 *et seq*.

Finally, the Seventh Circuit itself noted in its opinion that if the case involved the Confederate flag it would have come out differently. The court noted, "[E]xcluding the Confederate flag from a specialty-plate design [is a] fairly obvious instance[] of discrimination on account of viewpoint." *Id.* at 865. The Seventh Circuit recognized that the Confederate flag itself is a "viewpoint-specific symbol" and banning it is inherently viewpoint discrimination. *Id.* Thus, even if this case were decided by the Seventh Circuit, that Circuit would have reached the same conclusion as the Fifth Circuit.

IV.

WHETHER SPEECH "MIGHT BE OFFENSIVE TO ANY MEMBER OF THE PUBLIC" IS NOT A CONSTITUTIONALLY VALID STANDARD TO LIMIT SPEECH.

The DMVB denied Texas SCV's specialty plate application because it determined "that many members of the general public find the design offensive." App. 64. It has long been an established rule of First Amendment law that speech cannot be curtailed simply because it may be offensive to some.

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [T]he Constitution does not permit the government to decide which types of otherwise protected

> speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.

Snyder v. Phelps, 131 S. Ct. 1207, 1219-20 (2011) (alterations in original, internal quotations and citations omitted). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (quotations omitted). "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Snyder*, 131 S. Ct. at 1219 (internal quotation omitted).

Whether something "might be offensive to any member of the public" "is so nebulous and malleable [that it could mean] anything presently politically expedient." *See Lewis v. Wilson*, 253 F.3d 1077, 1080 (8th Cir. 2001) (alteration in original, quotation omitted), *cert. denied*, 535 U.S. 986 (2002) (rejecting "contrary to public policy" and "inflammatory" standards under personalized license plate regulations as unconstitutional and ordering Missouri to reissue personalized plate to applicant) (internal quotation omitted). The history of this case proves that the "might be offensive to any member of the public"

standard provides no objective guidance to speakers, gatekeepers, and courts to evaluate speech. Four different votes were taken by TxDOT and the DMVB, with widely different results.[37] The proposed speech had not changed at all during this process, proving the "offensiveness" standard is completely subjective.

There is almost no speech that does not offend someone. Non-Christians or atheists could be offended by the "One State Under God" plate with its depiction of three crosses on Calvary Hill, or the "One Nation Under God" Knights of Columbus plate. As noted above, there was some evidence in front of the DMVB that people were offended by the Buffalo Soldiers plate, but it was approved shortly after Texas SCV's was denied.[38] There is no objective standard by which to determine if a proposed specialty plate is "offensive." Not even the committees in

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[37] In October 2009, at the initial vote on the Texas SCV plate, three out of five of the members of the TxDOT specialty plate committee apparently determined that Texas SCV's plate was not offensive, and voted to approve the plate. App. 52. In December 2009, TxDOT's same committee voted again and determined by a majority that the plate was offensive. *See* App. 52, USCA5 293. In a vote on April 14, 2011, four members of the DMVB concluded that the Texas SCV plate was not offensive, and four other members disagreed. App. 45, ¶ 17. However, in the vote on November 10, 2011, all eight attending members of DMVB concluded that the plate was offensive. App. 46, ¶ 20; App. 60.

[38] USCA5 377, 451.

charge of enforcing the standard could consistently apply it. The Constitution does not allow the State to censor unpopular viewpoints because a few or even a majority finds them "offensive." Such a standard allows for unbridled discretion and is a recipe for viewpoint discrimination.

It is ironic that the DMVB defends the denial of the Texas SCV license plate application on the ground that the public finds the message offensive, when the State communicates the same message through enacting legislation giving State employees the right to take Confederate Heroes Day off work, through selling Confederate flags and replica Confederate currency in the gift shop, and through maintaining public monuments to the Confederate soldiers and Texas's role in the Confederacy. It is also unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The Texas Department of Motor Vehicles has "sole control" over what appears on a Texas license plate. Tex. Transp. Code § 504.005(a). Texas specialty license plates are therefore government speech under *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009), and *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560–61 (2005), which held that the government speaks when it "effectively control[s]" messages by exercising "final approval authority." On each license plate, Texas communicates a message within its sole control, and consenting motorists assist in spreading that state-approved speech.

Texas has not abridged any "traditional free speech rights," *Summum*, 555 U.S. at 474, by using license plates to communicate these messages. The respondents do not

dispute that they remain free to display the confederate battle flag on their vehicles in more prominent ways: from bumper stickers to window decals to car-sized paint jobs. What they cannot do is compel Texas to speak or to place its imprimatur on the confederate battle flag.

Untenable consequences would follow if a viewpoint-neutrality requirement is imposed on States that retain sole control over messages on their license plates. States that issue Fight Terrorism or World War II Veteran plates should not be compelled to print license plates approving of al Qaeda or the Nazi party. Texas has maintained sole control of its license plates and propagates only messages that it approves. Texas license plates are therefore government speech that private parties cannot co-opt.

ARGUMENT

I. THE CONTENT OF TEXAS LICENSE PLATES IS GOVERNMENT SPEECH

A. The Department's Sole Control Over The Content Of License Plates Is Dispositive

1. *Summum* and *Johanns* established a straightforward test to determine whether the government-speech doctrine applies: Has the government "effectively controlled" the message by exercising "final approval authority" over it? *Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560–61). If so, the message is a "form of government speech" immune from viewpoint-neutrality requirements. *Id.* at 464.

The doctrine applies even if private parties are used to deliver the speech. *Id.* at 468, 471; *Johanns*, 544 U.S. at 560, 562. As *Legal Services Corp. v. Velazquez* explains,

"the government [may] 'use[] private speakers to transmit specific information pertaining to its own program.'" 531 U.S. 533, 541 (2001) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see Rosenberger*, 515 U.S. at 833 (confirming that a government may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message") (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991)).

Government speech may even be financed by private sources. *Summum*, 555 U.S. at 464; *Johanns*, 544 U.S. at 562–67. And the government need not undertake any particular "formal process" publicly embracing the message. *Summum*, 555 U.S. at 473. What matters is whether the government has retained ultimate control over the message. *Ibid.*

2. Contrary to the respondents' contentions, *see* Resp. Br. 15, 18, 21, Texas has total control over the speech here. The Texas Department of Motor Vehicles "has *sole control* over the design, typeface, color, and alphanumeric pattern for all license plates." Tex. Transp. Code § 504.005(a) (emphasis added). And the Department's Board retains "*final approval authority* of all specialty license plate designs." 43 Tex. Admin. Code § 217.28(i)(8)(B) (emphasis added); *see id.* §§ 217.28(i)(7), 217.40(e)(3)(B); *see also* Tex. Transp. Code § 504.801(c) (directing the Department to "design each new specialty license plate in consultation with the sponsor"); *id.* §§ 504.002(3), 504.007(a)(3), 504.008(g)–(h), 504.851(f)–(g), 504.901(b)–(c) (reflecting that the State owns the design and color combination for each approved license plate and controls the transfer and disposition of plates after their issuance).

Accordingly, the Department has discretion to reject a requested design based on any information it has about the license plate. "The department may refuse to create a new specialty license plate if the design might be offensive to any member of the public," but it may also reject a plate "*for any other reason established by rule*." Tex. Transp. Code § 504.801(c) (emphasis added). In particular, the Board may deny a specialty plate based on "the proposed license plate design." 43 Tex. Admin. Code § 217.28(i)(5)(B). That broad prerogative includes denials based on any "information provided during the application process." *Id.* § 217.28(i)(5)(B)(iii); *see id.* § 217.28(i)(7)(A) (stating that the Board may disapprove a specialty plate "based on all of the information provided" to the Board).

The State's authority to control license plates extends to plates marketed and sold through private vendors to which the State has outsourced that responsibility, as well as to personalized plates. *See* Tex. Transp. Code § 504.851(h); 43 Tex. Admin. Code §§ 217.22(c)(4)(B), 217.28(c)(7)(C)(ii). The respondents' argument that "[t]he act of speaking [on license plates] is . . . entirely controlled by the driver," Resp. Br. 14, ignores Texas's statutory and regulatory scheme. Amici similarly ignore the extent of Texas's control over messages transmitted through the program. *See* ACLU Br. 15, 25 & n.20; Becket Fund Br. 9; Children First Foundation Br. 14–15; ACLJ Br. 11.

In short, Texas easily satisfies the "effective control" and "final approval authority" standards established by *Summum* and *Johanns*. The content of Texas license

plates is therefore government speech, and Texas consequently has no obligation to maintain viewpoint neutrality in deciding whether or how to speak on its license plates.

B. The Respondents Analyze Extraneous Factors

1. In light of *Summum*, *Johanns*, and the Department's control over Texas's license-plate program, it is unsurprising that the respondents attempt to add elements to the government-speech analysis. But *Johanns* rejects the extra elements that the respondents claim *Summum* adds—and vice versa.

a. Permanence is not part of the test. *Cf.* Resp. Br. 17. After all, *Johanns* found television advertisements to be government speech. 544 U.S. at 554–55, 562. Limiting the doctrine to permanent structures also makes no sense. Surely the respondents would concede that a presidential press conference constitutes government speech, irrespective of its transient nature. *See, e.g.*, *Legal Servs. Corp.*, 531 U.S. at 540 (noting that "the counseling activities" of the doctors in *Rust* "amounted to governmental speech").

Summum examined the permanence of monuments because it was necessary to explain why forum analysis was inappropriate in that case, despite the fact that parks are traditional public forums for other (more transient) forms of private speech. *Summum*, 555 U.S. at 464. Indeed, the respondents and various amici effectively concede that permanence on the level of a park monument is not generally required, as they acknowledge that license plates approved by a State Legislature may constitute government speech. Resp. Br. 29; Choose Life Br. 9 & n.5, 18; Children First Br. 16–17, 25; ACLJ Br. 11–12.

Moreover, even if the respondents' permanence analysis were apt and a year's worth of speech were somehow insufficiently permanent to constitute government speech, the Department provides automatic annual renewal notices for specialty license plates. 43 Tex. Admin. Code § 217.28(d)(3)(A). The owner need only pay a fee and submit any required paperwork to remain in the program. *Id.* § 217.28(d)(3)(B).

License plates are thus more like a monument that "endures" than a demonstration or a temporary installation. *See Summum*, 555 U.S. at 478–80; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (plurality op.) ("[V]iewers of billboards and streetcar signs [have] no choice or volition [but] to observe such advertising .... The radio can be turned off, but not so the billboard or street car placard.") (internal quotation marks omitted); *id.* at 305–08 (Douglas, J., concurring in the judgment). Like monuments and billboards, license plates convey speech that is fixed on a tangible medium for a lengthy duration and is presented in a manner that viewers cannot easily avoid.

b. There is also no requirement that government speech be closely identified with the government. *Cf.* Resp. Br. 17–18. *Johanns* makes clear that the government does not have to identify itself as the speaker in order to avail itself of the government-speech doctrine. 544 U.S. at 563–64 & n.7. "Close identification" is but another way of describing the reasonable-observer test, which was endorsed by only one Justice in *Summum*. 555 U.S. at 487 (Souter, J., concurring in the judgment); *see* Pet. Br. 27–32; Justice and Freedom Fund Br. 13–16; Ohio Br. 15–28; Berger Br. 19–25. Whether speech is closely identified

with the government is simply a factor that may (or may not) suggest that the government controls the speech at issue.

In any event, States are very much identified with any expression on their license plates. *See* Berger Br. 11–12 n.3. The reason cars must bear license plates is to comply with a state regulatory program that assigns to each vehicle unique identification that can be created only by the State. Tex. Transp. Code § 504.943. Hence, Texas places its name and the outline of the State on each license plate. *See* J.A. 29. These labels would satisfy even the disclosure standard for government speech set forth in the *Johanns* dissent. *See* 544 U.S. at 571–72 (Souter, J., dissenting) ("Sometimes . . . government can make an effective disclosure only by explicitly labeling the speech as its own.").

There is a clear line of demarcation between a license plate and a license-plate holder or a bumper sticker: only the plate is closely identified with the State. *Cf.* Resp. Br. 24. The license plate is an indivisible whole; it is not an assembly of different parts, nor is there any coherent or administrable way to conceive of it as having discrete parts. And the words and pictures that appear on license plates have long been used to shape the image of States in the mind of the public. *See* Scott W. Gaylord, *"Kill the Sea Turtles" and Other Things You Can't Make the Government Say*, 71 Wash. & Lee L. Rev. 93, 143, 149 (2014); *cf.* Resp. Br. 19, 23.

c. The respondents incorrectly assert that messages on license plates are not Texas's "'from beginning to end'" because these messages are purportedly "designed by private individuals" and "published by drivers." Resp. Br. 20, 21 (quoting *Johanns*, 544 U.S. at 560). The statutory

authority to design license plates, though, rests with the Department, Tex. Transp. Code § 504.801(c), and Texas has "sole control" over whether a plate will be created, *id.* § 504.005(a). There is, of course, a range of possible ways in which a private citizen can petition or encourage the government to speak. *Cf. Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) ("The right to petition allows citizens to express their ideas, hopes, and concerns to their government"). Texas law allows private citizens to present proposed plates and consult with the government as it designs those plates. *E.g.*, Tex. Transp. Code § 504.602(a) ("The department shall design [Keep Texas Beautiful] license plates in consultation with Keep Texas Beautiful, Inc."). But none of these formal avenues for private input diminishes the State's control over the speech.

The respondents offer an overly narrow reading of *Johanns*, as the Court there found government speech even though the government was not directly involved in each step of creating the message. 544 U.S. at 560 (noting that "[t]he Secretary of Agriculture does not write ad copy himself"). If there were any doubt, *Summum* rebuts the notion that the government must generate a speech concept and oversee its creation at each step. The monuments in *Summum* constituted government speech even though they were created and donated by private parties. 555 U.S. at 464–65.

d. The respondents also wrongly suggest that government speech must necessarily convey a "singular 'programmatic message.'" Resp. Br. 9. The park in *Summum* included a historic granary, a wishing well, the city's first fire station, a September 11 monument, and a Ten Commandments display—all of which constituted government

speech. 555 U.S. at 464–65. Similarly, *Summum* indicated that the various structures in New York's Central Park are government speech, *id.* at 472, 474–75, and "[t]here are 52 fountains, monuments, and sculptures in Central Park," Brief of Amicus Curiae City of N.Y. at 2, *Pleasant Grove City v. Summum*, 555 U.S. 460 (June 23, 2008) (No. 07-665), 2008 WL 2521268. These features include sculptures depicting Alice in Wonderland, Teddy Roosevelt, Shakespeare, the Pilgrims, the Civil War, and a 1925 dog-sled race. *Ibid.* It is hard to perceive a singular programmatic message there.

2. The respondents also attempt to avoid *Summum* and *Johanns* by asking the Court to consider two more extraneous factors: how frequently license-plate proposals have been rejected in the past, and which entity within Texas's government makes the approval decisions.

a. The respondents repeatedly suggest that the Board, which was not given authority over specialty-plate applications until 2009, *see* Act of May 19, 2009, 81st Leg., R.S., ch. 933, 2009 Tex. Gen. Laws 2485, has never denied another entity's application. Resp. Br. 1, 7, 14, 18. There is no record evidence to support that assertion, and in any event, this inquiry is not needed to establish that Texas law gives the Department sole control over messages on license plates.

If the respondents wish to explore propositions not reflected in the record, sources of that nature confirm that the Board has in fact denied both specialty and personalized plates. The Board has refused to approve one other specialty-plate application (a Texas DPS Troopers' Foundation plate), as demonstrated by a publicly available

transcript of a Board meeting.[1] And a news article reported that the Board denied over one percent of the roughly 43,000 personalized-plate applications it received in 2012, amounting to dozens of plate denials per month.[2]

Moreover, as the district court noted, an exhibit to the respondents' own motion for summary judgment confirms that the Board's predecessor (in the Texas Department of Transportation) denied a proposed pro-life specialty plate. Pet. App. 56a–57a; *see* USCA5 Record 278. The same predecessor also denied about a dozen other proposed specialty plates, according to internal Board documents not in the record. Texas is thus like the city in *Summum*, which also "regularly accept[ed]" privately proposed expression and at the same time "exercised selectivity" over the messages it wished to communicate. *Summum*, 555 U.S. at 471.

But the question of what plates have been denied in the past is a distraction. Even if the State had not denied a single license-plate application, what matters is that Texas law gives the Department sole control and the Board final approval authority to reject and disassociate from messages. *See supra* Part I.A; *cf.* Resp. Br. 18. To borrow an example from *Summum*, if the United States in its nascency had never rejected a monument offered by

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[1] *See* Tr. of Tex. DMV Bd. Meeting, Aug. 9, 2012, at 112, http://www.txdmv.gov/reports-and-data/doc_download/450-2012-trans-aug9 (last visited March 11, 2015).

[2] Robert Arnold, *Texas Personal License Plates: What's Considered Road Worthy?*, KPRC TV 2 Houston, http://www.click2houston.com/news/Texas-personal-license-plates-What-s-considered-road-worthy/18441360 (last visited March 11, 2015).

a foreign country, that would not force the government to accept "Lady Autocracy" if such a statue were offered for display on federal property. 555 U.S. at 479. Perhaps if Texas actually had established a program under which the State served "only [as] a printer" of plates, such that any plate could contain whatever a motorist wanted, Resp. Br. 15, the outcome would be different. But that is not this case, as Texas has reserved sole control and final approval authority over all plates issued through its program.

b. The respondents also assert that the specific branch of government approving a license plate affects the constitutional analysis. According to them, plates approved by the Texas Legislature may be government speech, whereas agency-approved plates categorically are not. *See id.* at 13–14, 28–29. *Johanns* forecloses this argument; the message at issue there constituted government speech because it was approved by a *government agency*, the U.S. Department of Agriculture. 544 U.S. at 560–61; *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality op.) ("[T]he particular state actor [carrying out state action] is irrelevant."); *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974) ("[T]he Constitution does not impose on the States any particular plan for the distribution of governmental powers.").

By arguing that plates may be government speech only when they are approved by a State Legislature, the respondents are essentially asking the Court to require "a formal process of adopting . . . the message"—a proposal unanimously rejected in *Summum*. 555 U.S. at 473 (internal quotation marks omitted); *id.* at 485 (Souter, J., concurring in the judgment). But even if some type of "formal

process" were required, Texas would meet the test. The Department provides notice and comment for new specialty plates, 43 Tex. Admin. Code §§ 217.28(i)(6), 217.40(d)(2), and the Board exercises its "[f]inal approval" authority by voting to "approve or disapprove" a plate proposal at "an open meeting," *id.* §§ 217.28(i)(7), 217.40(e).

Furthermore, the Texas Legislature delegated sole control over license-plate design to the Department, so the branch-of-government distinction is not as sharp as the respondents intimate. Legislature-approved plates are designed by the Department—often in conjunction with private sponsors, just like agency-approved plates. *See, e.g.*, Tex. Transp. Code § 504.608 ("The department shall design [Mothers Against Drunk Driving] license plates in consultation with Mothers Against Drunk Driving."). Regardless, Texas maintains sole control over the messages that appear on its license plates both when the Legislature has required the creation of a plate and when it has not.

C. The Respondents' And Amici's Efforts To Avoid The Government-Speech Doctrine Fail

1. The government-speech doctrine, of course, may not "be used as a subterfuge" for favoring some private speakers' points of view over others. *Summum*, 555 U.S. at 473; *see* Choose Life Br. 8; FIRE Br. 8; ACLU Br. 10 n.6; Becket Fund Br. 1–2; Children First Br. 10–11; ACLJ Br. 6–8. The Free Speech Clause therefore would generally prohibit laws decreeing that only government can speak in a traditional public forum for private speech—or that government is the only speaker that can address certain content or viewpoints in a traditional or designated

public forum for private speech. *Cf. Rust*, 500 U.S. at 200 (noting that government subsidization of speech "does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity") (internal quotation marks and citation omitted).

But Texas, like the city in *Summum*, has made no such effort to abridge "traditional free speech rights." 555 U.S. at 474; *see id.* at 484 (Breyer, J., concurring) (noting that the city did not "disproportionately restrict Summum's freedom of expression" in light of its legitimate governmental objective). Texas, rather, has communicated state-approved messages through an additional, particular medium over which the State has consistently maintained sole control. Texas's license-plate program allows motorists to transmit State-controlled messages. As in *Summum*, 555 U.S. at 474, and *Rust*, 500 U.S. at 198–99, the State's control over specialty license plates in no way limits its citizens' ability to convey messages rejected by the State in any number of other ways. The respondents do not dispute that there are ample alternative channels for speech on their vehicles alone—from bumper stickers and license-plate holders to window decals and paint jobs. The only difference between these channels and the specialty plate sought by the respondents is whether the State's imprimatur is given to the message.

2. The respondents mistakenly describe Texas's license-plate program as a forum for private speech. Resp. Br. 30. Far from demonstrating "clear [governmental] intent to create a public forum," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (internal quotation marks omitted); *see* Ohio Br. 22–24, the relevant statutory

provisions and the nature of the program evince the opposite intent.

First, the State maintains control over the messages transmitted on specialty plates, *see supra* Part I.A.2, and it has exercised selectivity about which plates to allow, *see supra* Part I.B.2.a—the antithesis of a forum for private speech. *See* Justice and Freedom Fund Br. 13 ("In other contexts, the government exercises an editorial function without incurring a constitutional obligation to open a public forum[.]") (citing *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)). That Texas has approved many plates does not negate its control. It merely illustrates the diverse array of interests the State is willing to showcase. *See* Gaylord, *supra*, at 143–51. For that reason, the respondents' reliance on *Legal Services Corp.*, which involved a program "designed to facilitate private speech" in connection with claims "against the government," 531 U.S. at 542, is misplaced. *See* Resp. Br. 24.

Nor does the State relinquish sole control of the messages on license plates if one of its motives for speaking is to generate revenue. Berger Br. 15–16; *cf.* Resp. Br. 19. Concerns about the pecuniary implications of one's speech are not unusual. Those concerns motivate the extent of speech by store owners selling products, professionals selling their services, and countless other speakers. Speakers' motives, additionally, are often multifaceted, if knowable at all. *See Summum*, 555 U.S. at 474–76.

Second, the license-plate program is not a private speech forum for precisely the same reason that a public

park is not a forum with respect to monuments: applying forum analysis would "defeat[] the essential function of the . . . program." *Id.* at 478. License-plate programs allow States to propagate messages and raise revenue through voluntary payments from their citizens while providing those citizens a means of promoting state speech. *See* Resp. Br. 19 n.24 (correctly noting that a portion of the revenue generated by the sale of Texas specialty license plates is deposited into the State's general revenue fund for the benefit of a specific state agency, or, if the plate sponsor did not nominate an agency to receive the funds, into a separate state fund used to support the Department's operations, *see* Tex. Transp. Code § 504.801(e)).

If States are not free to reject demands to place their imprimatur on controversial messages, it may be difficult for them to maintain specialty- and personalized-plate programs. *See Forbes*, 523 U.S. at 681 ("Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide the safe course is to avoid controversy . . . .") (internal quotation marks omitted). States will recoil from the prospect of placing their names next to messages amplifying al Qaeda or the Nazi party. *See* Pet. Br. 41–46; Ohio Br. 7–11 (noting the specialty-plate messages that various States have authorized and voicing the type of "well founded" concerns that the Court acknowledged in *Summum*, 555 U.S. at 479). The respondents have no answer to this.

Moreover, it is beside the point whether many people would want controversial plates, as even a few could render the program unworkable. And the steady stream of

personalized plates that any State's program inevitably rejects, *see, e.g.*, *supra* Part I.B.2.a, illustrates that there is a significant demand for license plates with crude, profane, or otherwise objectionable content. Few if any States would be willing to stamp these messages with their seals of approval and etch them onto their license plates. And a similar fate could befall other government-speech programs that utilize private input, such as those for U.S. postage stamps[3] and Adopt-a-Highway signs.[4]

3. Finally, the fact that speech on specialty license plates is government speech means that other constitutional restraints apply, such as those imposed by the Establishment Clause and the Equal Protection Clause. *Summum*, 555 U.S. at 468; *see* Pet. Br. 39 n.6. But contrary to the assertions of amicus Americans United for Separation of Church and State (at 6–12), Texas's argument is not inconsistent with positions it has taken in previous Establishment Clause cases.

In *Santa Fe Independent School District v. Doe*, Texas's amicus brief in this Court argued that the school district lacked sufficient control over the speech at issue for that speech to be attributed to the State. Brief of Amicus Curiae State of Texas, et al. at 5–9, *Santa Fe ISD v. Doe*, 530 U.S. 290 (Dec. 30, 1999) (No. 99-62), 1999 WL

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[3] *See* 39 U.S.C. § 416; 39 C.F.R. §§ 551.1–551.8; U.S. Postal Serv., *The Stamp Selection Process*, https://about.usps.com/who-we-are/csac/process.htm (last visited March 11, 2015).

[4] *See* 43 Tex. Admin. Code § 12.3; Texas Dep't of Transp., *Adopt-a-Highway*, http://txdot.gov/inside-txdot/get-involved/volunteer/adopt-a-highway.html (last visited March 11, 2015).

1272942. The Court disagreed, concluding that an invocation "authorized by a government policy and tak[ing] place on government property" could not be regarded as private speech, 530 U.S. at 302—even though the message was "selected or created by [the] student," *id.* at 324 (Rehnquist, C.J., dissenting). *See* Ohio Br. 25. Regardless, Texas maintains far more control over the speech in its license-plate program, so there is nothing inconsistent about its position in this case.

And in *Schultz v. Medina Valley Independent School District*, Texas's amicus brief in the Fifth Circuit pointed out that the school district exercised substantially less control over student speech than the policies at issue in *Santa Fe* and *Lee v. Weisman*, 505 U.S. 577 (1992). Brief of the State of Texas as Amicus Curiae at 4–5, *Schultz v. Medina Valley ISD*, No. 11-50486 (5th Cir. June 2, 2011). The court of appeals agreed. Order at 1, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011) ("[W]e are not persuaded that plaintiffs have shown . . . that the individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored."); *cf. Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014) ("Greece neither reviewed the prayers in advance of the meetings nor provided guidance as to their tone or content").

D. The Respondents Cannot Compel The State To Speak

1. The respondents have any number of similar (or better) avenues for expressing their message. Their insistence on forcing Texas to issue a specialty plate featuring the confederate battle flag demonstrates what this lawsuit is really about: compelling Texas to lend its imprimatur to

a message that Texas does not wish to convey. But the respondents do not contest that States, like private citizens, are free to disassociate from messages. Pet. Br. 25–27; *see Rust*, 500 U.S. at 192 (government is entitled to "make a value judgment" supporting certain speech without providing similar assistance with respect to alternative viewpoints) (internal quotation mark omitted).

The respondents misunderstand *Wooley v. Maynard*, 430 U.S. 705 (1977), which turned precisely on the fact that the motorist was being forced to display the State's message. *Cf.* Resp. Br. 25–27. *Wooley* specifically recognized that license plates serve as "mobile billboard[s] for the State's . . . message," in that they provide a platform for "[t]he State . . . to communicate to others an official view" regarding topics of state interest. 430 U.S. at 715–17; *see supra* p. 5 (noting the respondents' and amici's concession that legislatively approved specialty plates may constitute government speech). That a specialty license plate may also convey a motorist's endorsement of the message does not change the fact that the government is speaking when it issues the plate as part of a state-operated program within its sole control. *See Summum*, 555 U.S. at 464–65 (concluding that a privately donated Ten Commandments monument was government speech even though it featured the Fraternal Order of Eagles' name).

The correct approach is to recognize that neither the State nor the motorist can force the other to promote a message. That approach respects both the State's prerogative to "select the views that it wants to express" through a license-plate program, *id.* at 468, and the private individual's right not to disseminate the State's chosen mes-

sages, *Wooley*, 430 U.S. at 717. In no way does *Wooley* provide motorists with a right "to speak . . . on their license plates," Resp. Br. 26, that trumps the State's right to choose the messages it wishes to communicate and promote. Put differently, license-plate speech cannot occur without both Texas's approval of the message and the motorist's cooperation and consent.

2. Besides depending on extra-record information not properly subject to judicial notice, *see* Fed. R. Evid. 201(b), the respondents' digression into Texas's alleged endorsement of the Confederacy, Resp. Br. 1, 6, 10–12, 33–34, 39, is both irrelevant and misleading.

The "miniature Confederate flags" sold in the Texas Capitol gift shop, Resp. Br. 1, are replicas of the first national flag of the Confederacy, which does not contain the St. Andrew's Cross that makes the confederate battle flag a forceful symbol in the minds of many Americans, *see* Pet. App. 55a & n.2. Like the monuments and other confederate references that the respondents identify, the miniature confederate national flags (which are sold in sets that include the five other flags that at one point flew over Texas) acknowledge the Confederacy's existence in Texas history.[5]

Furthermore, the respondents cannot compel Texas to speak in any particular medium. Texas's decision to place monuments to fallen soldiers on the Capitol grounds, for example, does not oblige it to place similar messages on billboards. The respondents' approach would embroil

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[5] *See* Texas Capitol Gift Shop, Six Flags Over Texas Desk Set, http://www.texascapitolgiftshop.com/Six-Flags-Over-Texas-Desk-Set-P253.aspx (last visited March 11, 2015).

courts in disputes that could be resolved only through conceptually incoherent inquiries into what States truly believe about specific matters. Texas should not be forced to associate itself with the confederate battle flag on its license plates.

II. THE BOARD DID NOT ENGAGE IN VIEWPOINT DISCRIMINATION

The respondents do not argue that Texas's license-plate program is anything more than a non-public forum that the State may limit to "certain groups or . . . subjects," *Summum*, 555 U.S. at 470. *See* Resp. Br. 30–36. Restrictions on speech in a non-public (or "limited") forum need only be reasonable and viewpoint neutral. *Summum*, 555 U.S. at 470. Thus, even assuming arguendo that the license-plate program is a non-public forum for private speech, the respondents are wrong to suggest (Resp. Br. 36–37) that the analysis here is guided by *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991). Those cases did not involve non-public forums. *Snyder*, 131 S. Ct. at 1218 (public streets); *Simon & Schuster*, 502 U.S. at 116 (books).

In denying the respondents' specialty-plate application, Texas did not discriminate on account of viewpoint. Like the State in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 865 (7th Cir. 2008)—which denied a pro-life plate without issuing a pro-choice plate—Texas has not entered the "debate" regarding the proper understanding or significance of the confederate battle flag. *Cf. United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality op.) (noting that *Lehman*, 418 U.S. at 304 (plurality op.), found no

First Amendment violation when a city limited advertising space on city-owned buses to "less controversial" topics). The Board merely concluded that some members of the public might be offended by the respondents' use of the flag and denied the application for that reason. Pet. App. 69a; *see also Perry v. McDonald*, 280 F.3d 159, 169–71 (2d Cir. 2001) (concluding that Vermont's revocation of a personalized (or "vanity") plate based on offensiveness amounted to lawful content discrimination). The State never expressed its own view on the subject or approved responsive viewpoints.

The respondents mischaracterize *White* as holding that excluding depictions of the confederate battle flag necessarily constitutes viewpoint discrimination. *See* Resp. Br. 36. In commenting on the confederate battle flag, *White* was analyzing a case in which the Sons of Confederate Veterans was allowed to have a specialty plate, just not one featuring the confederate battle flag. *See White*, 547 F.3d at 865 (discussing *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 613 (4th Cir. 2002)).

Finally, the respondents argue that the State has failed to adduce evidence demonstrating that "the entire 'issue' raised by the [respondents]" has been excluded from the program. Resp. Br. 35. That has it backwards. Even assuming license plates have been opened up as a non-public forum (and they have not), the State has reserved final approval authority over all plate messages, and no speech may occur without its permission. The burden therefore falls on the respondents to identify evidence that Texas has allowed opposing viewpoints on the subject, and the respondents have not met that burden.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *USAID v. AOSI*, 133 S. Ct. 2321 (2013). ACLJ attorneys regularly litigate in the area of free speech, including the scope of government speech. *E.g.*, *Pleasant Grove; Lamb's Chapel*.

As an association of Christian attorneys, law students, and law professors, the Christian Legal Society ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, speech, and assembly. For four decades, through its Center for Law and Religious Freedom, CLS has defended citizens' rights to express their religious ideas and beliefs in the public square, through advocacy in this Court and through legislation. For example, CLS was instrumental in the passage of the

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[1]The parties in this case have consented to the filing of this amicus brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Equal Access Act of 1984, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2012). *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement). CLS categorically rejects the racism many view as represented by the flag at issue in this case. But the Confederate battle flag has done enough damage in American history and should not be allowed to work further injury by damaging the First Amendment. The flag is understandably seen by many individuals as a racist symbol, but that alone does not justify distorting free speech doctrine in order to suppress it. The First Amendment's bedrock principle must remain that the State may not deny access to a forum open to other speakers because the State disapproves of the speaker's message.

SUMMARY OF ARGUMENT

This amicus brief makes two main points: (1) proper application of the government vs. private speech doctrine must analyze the particular components of the activity, rather than attempt to slap a single label over the entire enterprise, and (2) exclusion of a particular symbol because of the offensiveness of what it stands for is classic viewpoint discrimination.

1. Identifying speech as governmental or private can be obvious, but in some cases drawing the distinction can seem daunting. When a particular instance of expression emerges from a mix of both government and private input – e.g., specialty or vanity license plates, or guest speaker or student expression at a public school event – proper analysis

requires the Court *to analyze separately the component parts* of the activity in question, rather than attempt to attach a blanket label to the entire activity. Such an analysis, applied to this case, shows that the content of SCV's proposed specialty license plate is the constitutionally protected *private* speech of the SCV, not the speech of the state. Hence, the government speech doctrine does not preclude First Amendment scrutiny.

2. Viewpoint discrimination is generally the worst form of censorship in under the First Amendment. Censorship of a particular symbol, for the express reason that the symbol represents, in the eyes of some observers, *ideas* that are offensive, is viewpoint discrimination even if the state has not condoned or approved the opposite message.

ARGUMENT

The speech to which petitioners object is the private, constitutionally protected speech of entities invited to put their messages on specialty plates, not the government speech of the state. Moreover, the exclusion of the proposed plate design, expressly because some people found a symbol on that plate offensive for what that symbol stands for, is classic viewpoint discrimination.

I. THE SPEECH TO WHICH RESPONDENTS OBJECT IS PRIVATE SPEECH, NOT GOVERNMENT SPEECH.

A private entity's proposed message-bearing specialty plate design is private speech. Where the government by policy and practice routinely approves such proposals, the selective denial of such a proposal triggers First Amendment scrutiny. The fundamental problem with the approach Texas proposes is that it seeks, not simply to *justify* the state's rejection of certain private speech, but to categorically *deny any First Amendment analysis* of a restriction on that speech, by labeling the speech as "government speech."

A. The Distinction Between Government Speech and Private Speech is Crucial.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Hence, the classification of speech as "government" or "private" can be, and often is, decisive of a First Amendment claim. It is vital, therefore, that the distinction between the two categories be drawn correctly.

When, as in this case, the speech at issue occurs in the context of a mix of private and government action, proper constitutional analysis *must* focus upon the particular, specific components of the activity or program at issue in order to avoid erroneously lumping both government and private speech under one, ill-fitting, blanket label. *Infra* § I(C).

B. This Court Should Reject the Tests Texas Proposes.

The tests Texas suggests for drawing the distinction between government and private speech are wrong, or at least incomplete.

First, Texas proposes that speech is "government speech" if it takes place "within the scope of [a] government program." Pet. Br. at 13. This is plainly wrong. The private speakers in this Court's "equal access" cases spoke within the scope of some facilities use program (as in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)) or educational program (as in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). The private entities seeking contributions from government employees (*Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)) or access to teachers (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) spoke within the scope of government programs (the Combined Federal Campaign and the school's internal mail system, respectively). All communications to and from prisoners take place within the scope of state penal programs. *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Yet in none of these cases did this Court apply the government speech doctrine, which would have left the restricted speech devoid of First Amendment protection.

If Texas were correct that all speech "within the scope of a government program" is government speech, then whenever a government entity hosted a panel discussion on a topic or invited speakers to a college graduation, the government would possess complete

censorship power over the private speakers. And if Texas tries to salvage its argument by contending that the "scope of the program" includes only the government's own speech, not that of private speakers, then this "test" becomes circular and thus useless as a means of identifying government speech.

Second, Texas contends that speech becomes government speech whenever the government may feel the need to disassociate itself from the message. Pet. Br. at 13. But this also is not right. Third-party speech on the grounds of a shopping mall did not become the speech of the mall owners just because the owners might have objected to being associated with the message. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980). And the desire of a public school or university to distance itself, for anti-establishment purposes, from the religious message of private users, as in *Widmar*, *Lambs Chapel*, *Good News Club*, etc., did not morph the private speech into government speech. Merely *allowing* private speech does not convert it into government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality). The government's desire to disassociate itself from a private message goes to the asserted *justification* for the restriction on private speech, not the nature of the speech itself.

The third test Texas offers – whether the government "effectively controls" and "exercises final approval authority" over the message, Pet. Br. at 14 – is closer to the target. However, this test runs the risk of being question-begging. Anytime the government censors a message, the government can, in self-justifying fashion, say that its very assertion of

censorship power itself demonstrates that the government controls and approves (or disapproves) the message, rendering it government speech outside the scope of First Amendment protection. But this cannot be true, as it would largely nullify the Free Speech Clause and would require overruling a long list of First Amendment cases, from *Cantwell v. Connecticut*, 310 U.S. 296 (1940), to *Snyder v. Phelps*, 562 U.S. 443 (2011), to everything in between. Nor could Texas rescue its circular approach by limiting it to speech that the government hosts or subsidizes. Such a rule would still require the overturning of, or dismissing as analytically obsolete, a long list of precedents, encompassing not just the equal access cases but also public broadcasting (*FCC v. League of Women Voters*, 468 U.S. 364 (1984)), permit programs (*Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)), government aid programs (*Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *USAID v. AOSI*, 133 S. Ct. 2321 (2013); *NEA v. Finley*, 524 U.S. 569 (1998)), and speech on government-controlled premises (*Lee v. ISKCON*, 505 U.S. 830 (1992) (per curiam) (airport terminal); *Cornelius* (government work space); *United States v. Kokinda*, 497 U.S. 720 (1990) (post office grounds); *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (public rights of way); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *United States v. Grace*, 461 U.S. 171 (1983) (grounds of Supreme Court); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (board of education meetings); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (public school premises); *Flower v. United States*, 407 U.S. 197 (1972) (military

base)). In all such cases, First Amendment scrutiny applied, regardless of which side ultimately prevailed. The notion that speech in such contexts *ipso facto* becomes government speech, just because the government claims the right to control it, is analytically and precedentially indefensible.

C. To Draw the Line between Government Speech and Private Speech, a Court Must Analyze the Component Parts Separately.

Proper analysis of whether speech is government or private in nature requires a court to look, not at the activity or program as a whole, but rather at the particular aspect at issue.

"There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Pleasant Grove*, 555 U.S. at 470. Cases involving "mixed speech" of government and private parties seem particularly to have flummoxed the lower courts, leading them to compose cumbersome multi-pronged tests in a vain attempt to find the perfect formula for labeling the speech in question. *See, e.g., Sons of Confederate Veterans v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (referring to four-factor test used in other circuits, but describing those factors as not necessarily "an exhaustive or always-applicable list"). The goal of such tests seems to be to figure out what blanket label to apply to the speech at issue. But this goal is itself misguided. There is no necessity to apply a blanket "government" or "private" label to the entirety of the interplay between governmental and private actors. A famous artist's speech does not become government

speech just because the artist delivers that address at the commencement exercises of a state school (even if the school requires assignment of intellectual property rights in the speech). The remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion (even if the government conditions participation upon conferring intellectual property rights, e.g., to publication, to the government agency).[2] In all such cases, a court should *examine the component parts* to determine whether the particular content in question is government speech.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter raising Establishment Clause questions)? The best answer to this question is not found by asking the question, "Whose speech is the talent show, the school's or the participants'?" Both are speakers, so any blanket label will not fully correspond to reality. Rather than collapsing together the school's involvement and the student's role, a court should therefore examine the constituent parts separately. Thus, the school is the one that chooses to have a talent show; that determines which student grade levels are eligible to participate; that sets the date, time, and length of the program; and that sets the parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply. But what

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[2]The detail that Texas asserts ownership rights over specialty license plate designs is therefore not dispositive.

about the song itself? It depends. If the school picks the song, then yes, that content is government speech (though the student's manner or style of performing it is not). If the school provides a limited menu of song options (or identifies a theme), then the delineation of that list (or theme) is state action or government speech (though the student's voluntary selection within those parameters is a private choice). If the school leaves the choice entirely to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the student's speech, even though it is situated in the midst of a government program. Separate analysis of the particular components of the program or activity thus trains in upon the identity of the actor making the relevant content choice, rather than attempting to make a global judgment about the entire production.

Another example would be a state college graduation ceremony. The college decides to have the ceremony, when and where to do so, and whether to have an outside speaker. That is all state action (and, to the extent it is expressive, is government speech). If the college officials select a guest speaker (as opposed to letting students pick one, for example), that selection is also government speech. The college may limit the speaker as to length or topic (with the speaker free, of course, to decline the invitation). But when the guest speaker then chooses what words to say, that is private speech, not government speech. To ask, "Is a graduation ceremony government speech?" is therefore to ask the wrong question. Instead, the analysis must focus upon what *part* of the program the government seeks to restrict, and who – the government or a private party – is responsible for formulating that part.

D. Texas Objects to Private Speech.

Turning to the case at hand, analysis of the components of the Texas specialty plates program reveals that Texas is objecting to private speech, in particular to a specific symbol. The question is not whether "specialty plates" as a whole are private or government speech – both are involved – but rather whether the state's rejection of a proposed plate design is the rejection of private speech.

Specialty plates are not necessarily government speech or private speech. Much depends upon how the program is set up. If the legislature individually adopts each design on a case-by-case basis, as in North Carolina, *see Berger v. ACLU of North Carolina*, No. 14-35 (U.S. cert. petition pending), then every such specialty plate may be government speech, i.e., a message belonging to a limited list of menu options promulgated by the state itself. To be sure, an individual driver's choice to pay for and display a given plate is private action and private speech. But if one cannot expect that the state will routinely approve whatever message a private proponent desires, and it is clear that every individual message is promulgated by the government (even if proposed, like many bills, by private parties), then the specialty plate messages are government speech.

By contrast, where a state sets up a standing system whereby private persons or entities can propose their own designs willy-nilly, subject only to standards of visibility, distinctiveness, and reflectivity, Pet. App 57a, where no extraordinary government initiative (like legislation) is required, and where such proposals are, as a matter of practice, routinely approved, the state has essentially set up a forum for private speech.

In such circumstances the state cannot fairly be said to be uttering its own government speech. That the government might reserve a veto prerogative does not change the *nature of the speech*. For example, a school's reservation of a right to veto the meeting of any particular student club, or to censor the content of a guest speaker at a graduation ceremony, would not convert such student meeting or guest speaker's address into government speech. Otherwise the challenged censorship power would be self-justifying, not just under First Amendment analysis, but by taking the case out of the First Amendment altogether.

Here, Texas has installed both kinds of systems. The legislature's plate-by-plate approval of particular designs is government speech, while the plates routinely processed and approved by the DMV Board represent private speech. The difference is not the fact that in one system the legislature approves, while in the other an agency does. *Cf.* Pet. at 12 (attacking this distinction). Rather, the difference is the "policy and practice" of the government, *Cornelius*, 473 U.S. at 802, that evidences in this case, on the one hand (the legislative program), consummate government selectivity, and on the other (the agency program), an essentially open-door approach to private speakers. This is the same distinction between a government official who selects various decoration for the walls of an agency's offices (government speech), and a government official who opens the walls of the agency's lobby for rotating student art displays from local public and private schools (private speech).

Here, the composition of the particular proposed specialty plates was completely the work of the private speakers. *Compare Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (finding government speech

where the "message is from beginning to end the message established by the Government"). The content of the proposed plates was private speech, not government speech, and the Free Speech Clause analysis must proceed on that basis.

II. DISALLOWING PRIVATE SPEECH BECAUSE OF THE OFFENSIVENESS OF THE IDEAS FOR WHICH IT STANDS IS CLASSIC VIEWPOINT DISCRIMINATION.

Government prohibition of a symbol, on the basis that the ideas that symbol stands for might be offensive to some, is classic viewpoint discrimination.

Certainly the term "offensive" is broad enough to include communications that could be restricted in viewpoint-neutral fashion. For example, a state might seek to forbid profanity or crude language on specialty or vanity plates. (Whether that effort would be successful is a question for another day. *Compare Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), *with Cohen v. California*, 403 U.S. 15 (1971).) A state might likewise desire to bar nudity or explicitly sexual depictions on specialty plates (*compare Sole v. Wyner*, 551 U.S. 74 (2007), *with Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)), or messages likely to invite a violent response (i.e., fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

But there is another meaning to "offensive" that strikes more directly at the heart of the First Amendment, namely, "objectionable because of the ideas it represents." Rejection of *ideas* because they occasion offense is the antithesis of free speech. "After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick*, 551

U.S. 393, 409 (2007). Such offense-based censorship represents viewpoint discrimination, i.e., bias against certain ideological positions or perspectives.

The ban on the Confederate battle flag in this case is an example of the viewpoint-based use of "offensive." Leaving aside the debate whether the SCV or its critics (or both) have the correct reading of the meaning of that flag, it is undisputed here that the state's disallowance of SCV's proposed specialty plate represented a rejection of an offensive *idea* – racism – which that flag is understood by many to represent. That makes the exclusion *viewpoint-based*.[3]

Texas argues that the exclusion is not viewpoint-based where the state has not endorsed or approved a specialty plate with the opposite message, i.e., a condemnation of the Confederate battle flag. Pet. Br. at 15, 52. This is very mistaken. Rejection of a symbol which, as here, equates to rejection of the idea(s) for which it stands, suffices to show the rejection of a viewpoint. The government official who censors a meeting for its socialist perspective need not approve a meeting of capitalists before the viewpoint bias can be established. Just so, the state need never affirmatively approve disparagement of the Confederate battle flag before a court can conclude

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[3]The Fifth Circuit said that the state's disallowance of the SCV plate "discriminated against Texas SCV's view" about the Confederate battle flag and "implicitly dismissed that perspective." Pet. App. 18a. This cumbersome phrasing obscures the heart of the matter. The viewpoint discrimination consisted, not in the state's adoption of a contrary viewpoint – it is entitled to do so – but in its censorship of SCV's viewpoint. As the Fifth Circuit more aptly phrased it further on in its opinion, "it appears that the only reason the Board rejected the plate is the viewpoint it represents." Pet. App. 19a.

that the rejection of SCV's plate was viewpoint-based. The second shoe need never drop to prove that the first item dropped was, in fact, a shoe.

Texas objects to this conclusion by raising the prospect of specialty plates favoring terrorism, drunk driving, or child abuse, Pet. Br. at 10, but such law school hypotheticals are triply flawed. First, these suggestions are highly, highly unrealistic. As Texas concedes, *id.* at 36, drivers are already free to post the same distasteful hypothetical messages on bumper stickers, but they do not. It is hard to see why the prospect of a specialty plate would make someone more likely to go to the time, effort, and expense of that route to affix such unpalatable messages to one's car. Second, states are free, for budgetary reasons, to deny manufacture of a specialty plate until a minimum number of subscribers (enough to justify the expense of production) have pledged to purchase the plate. So even if an occasional crank were to propose a particularly noxious message, it is hard to believe there would be enough other people willing to commit their money (and reputations) to start the production line going.[4] And third, while Texas has focused on consensus examples of especially horrendous speech, there will be other cases where there is legitimate debate about whether a particular notion – favoring birth over abortion, or vice versa; supporting Israel or

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[4] It is normally unconstitutional to restrict an idea because of its unpopularity. However, a neutral, reasonable restriction that *incidentally* reduces the availability of one option for speaking is a different animal. *Cf. American Party of Texas v. White*, 415 U.S. 767, 782-83 (1974) (state can insist upon a "significant, measurable quantum of community support" as a condition of ballot access).

the Second Amendment or "going green," or vice versa – will be sufficiently offensive to some to warrant censorship. *Compare* Pet. Br. at 49 ("Everyone knows that statements or logos touching on matters of politics or race are likely to offend others").[5] Texas's emphasis on the worst cases does not justify empowering states to make judgment calls that are more likely to shade from censoring ideas that garner universal condemnation into censoring ideas that represent sides in hotly (or even mildly) contested debates.

* * *

This brief does not address the state's suggestion that the messages on state specialty plates should be analogized to *advertisements* subject to the state's editorial control. Pet. Br. at 26-27, 31, 37.[6] Nor does this brief address the question whether, in the specialty plate context, viewpoint discrimination may be *justified* against a symbol many people may find

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[5]Texas also argues that a veto based upon the reaction of the public is objective and viewpoint-neutral. Pet. Br. at 47-48. But an audience reaction that finds an idea or symbol offensive reflects the *subjective viewpoints* of those viewers. *See Forsyth County v. Nationalist Movement*, 505 U.S. at 134. Government enforcement of such private viewpoint-based objections to ideas runs afoul of the norm that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[6]Importantly, in the advertising context the speech remains that of the *advertiser*. The NASCAR driver is essentially selling space on the driver's car or uniform, just like the New York Times sells space on its pages. It is the advertiser, not the newspaper, that sells clothing or touts housekeeping services. Hence, Texas is mistaken to see this analogy as an argument for a finding of government speech.

offensive for the ideas it represents – a Playboy bunny logo, a hammer and sickle, a Redskins logo.[7] Hence, this brief is filed in support of neither party.

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[7]Amicus does note, however, that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional," *Rosenberger*, 515 U.S. at 830 (internal quotation marks omitted).

CONCLUSION

This Court should clarify the proper analysis of the distinction between government and private speech as outlined above. In addition, this Court should reiterate that the rejection of a symbol, because of objection to the ideas the symbol is perceived to stand for, is viewpoint discrimination.

Respectfully submitted,

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IN THE

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JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,

Petitioners,

—v.—

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTH CAROLINA, AND THE ACLU OF TEXAS, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for over ninety years, and has appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*, including *American Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014), *petition for cert. filed sub nom. Berger v. Am. Civil Liberties Union of N.C.*, No. 14-35 (July 11, 2014), which raises issues similar to those presented in this case. The ACLU of North Carolina and the ACLU of Texas are statewide affiliates of the national ACLU.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents the question whether a government body may sell the opportunity to create personalized messages on government property, but restrict that program only to ideas or groups of which the state approves. Here, that question arises in the context of Texas' specialty license plate program, which markets the ability to "personalize" messages that individual drivers display on their vehicle

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[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs in this case. No party has authored this brief in whole or in part, and no one other than *amici*, its members, or counsel has paid for the preparation or submission of this brief.

plates. Predictably, this forum prompted applications from a variety of groups, from the benign to the controversial. In this case, the Sons of Confederate Veterans (SCV) requested a design bearing the Confederate flag. The State rejected the proposed plate as too offensive to the public.

The Confederate flag has a symbolic significance that many African-Americans and others consider offensive, and for good reason. The Confederate flag was flown by those who defended slavery and sought to dissolve the Union. That ideology was vanquished on the battlefield by the Civil War, but, 150 years later, its legacy has yet to be eliminated "root and branch" from American society. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

Texas has many options available to it to address that problem, but censorship is not one of them. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see also Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (noting that the appropriate response to speech that offends is "more speech, not enforced silence"). That is precisely what Texas has done, however, by creating a specialty license plate program as a forum for private speech, and then regulating access to that forum by engaging in explicit viewpoint discrimination. By excluding SCV from the state's license plate program, Texas therefore violated the First Amendment, as the Fifth Circuit correctly held.

Texas offers three methods for the creation of a specialty license plate. First, the state legislature may specifically authorize a new plate design.[2] Second, an individual or for-profit organization may generate a design through a state-authorized private vendor called MyPlates.com, subject to approval by the Texas Department of Motor Vehicles Board (DMVB).[3] Finally, and at issue here, the DMVB may issue a new specialty license plate either on its own or after approving an application from any non-profit organization. Tex. Transp. Code Ann. § 504.801(a) (West). In discussing Texas' specialty plate program generally throughout this brief, *amici* make reference only to this third avenue for non-profit specialty plates.

An organization interested in creating a new specialty plate must submit to the Department of Motor Vehicles (DMV) an application that includes a draft design, a marketing plan, and an $8000 deposit

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[2] Legislative plates are codified in Tex. Transp. Code Ann. §§ 504.602–63 (West), and most designs either support a Texan association (*e.g.*, "Texas Young Lawyers Association," *id.* § 504.612; "Daughters of the Republic of Texas," *id.* § 504.637; "Texas Lions Camp," *id.* § 504.656); or an asserted state interest (*e.g.*, "Save Our Beaches," *id.* § 504.6275; "Fight Terrorism," *id.* § 504.647).

[3] *See* 43 Tex. Admin. Code § 217.40. Drivers may log on to MyPlates.com to: a) select from limited releases of seven-letter personalized plates (*e.g.*, "FREEDOM"), b) create their own message of up to six characters or numbers and select one of over 150 background designs, or c) simply choose one of over 150 background designs with a random letter and number combination. The background design options include various color combinations, as well as the emblems of high schools and universities, sports teams, businesses, and charities.

to cover the cost of producing the first 1000 plates. *Id.* at § 504.702(b)(3); 43 Tex. Admin. Code § 217.28(i)(2). Each license plate design is posted on the DMV website for public comment at least 25 days in advance of an open DMVB meeting in which the proposed design will be considered. 43 Tex. Admin. Code § 217.28(i)(5)(C)(6). At this meeting, the Board hears public testimony regarding the plate design before voting to accept or reject the sponsoring non-profit's application. *Id.* §§ 217.28(i)(6)–(7)(A). If a design is accepted, the DMVB still has "final approval authority" and "may adjust or reconfigure the submitted draft design to comply with format or license plate specifications." *Id.* § 217.28(i)(8)(B). State regulations permit the DMVB to reject a specialty plate that does not meet standards specified by the department, such as legibility, reflectivity, and uniqueness, *id.* § 217.28(i)(5), or "if the design might be offensive to any member of the public or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c) (West).

On August 18, 2009, SCV submitted a specialty license plate design to the Texas Department of Transportation (DOT), which administered the specialty plate program at the time. The proposed design included the SCV seal, which consists of the Confederate battle flag surrounded by the words "Sons of Confederate Veterans 1895." There is no dispute that SCV submitted a complete application and that its design met the State's technical standards.

DOT initially approved SCV's specialty plate design. It then held a second vote without any procedural basis for doing so, and denied SCV's

application on December 21, 2009. After administration of the specialty plate program moved to the DMV, SCV submitted a renewed application for its plate design on October 27, 2010. The DMVB approved the design as to its formatting requirements, posted the plate design on its website for public comment, and held a vote at the Board's April 2011 meeting, which resulted in a deadlock of four members in favor of the SCV plate design and four against it. The vote was rescheduled for November 10, 2011. The November 10th meeting was well-attended by members of the public, many of whom voiced opposition to SCV's design, and concluded with a unanimous vote rejecting SCV's application. The Board issued a resolution, which included the following explanation for its denial: "The Board has considered the information and finds it necessary to deny this plate design application, specifically the [C]onfederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." *Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, No. A-11-CA-1049-SS, 2013 WL 1562758, at *6 (W.D. Tex. Apr. 12, 2013) [hereinafter *Vandergriff I*] (emphasis and internal citations omitted), *rev'd* 759 F.3d 388 (5th Cir. 2014) [hereinafter *Vandergriff II*].

SCV filed a complaint challenging the DMVB's decision as a violation of its First and Fourteenth Amendment rights. The district court ruled that Texas' specialty plates implicate private speech and comprise a nonpublic forum, but found no viewpoint discrimination. *Vandergriff I*, 2013 WL 1562758 at *19. The Fifth Circuit reversed and remanded,

agreeing that the plates consist of private speech, but deciding that the DMVB did indeed engage in viewpoint discrimination when it denied SCV's specialty plate application. *Vandergriff II*, 759 F.3d 388, 400.

SUMMARY OF THE ARGUMENT

The Confederate battle flag was the banner for those who supported slavery and sought to break our nation apart. It later served as a rallying sign for those seeking to maintain racial separation in all facets of life, from the voting booth to the wedding chapel.

While *amici* agree with the State that the message conveyed by the Confederate flag is offensive to many people, *amici* agree with SCV that Texas' specialty license plate program is a forum for private speech, and that the DMVB is therefore prohibited from denying access to that forum on the basis of viewpoint.

These license plate disputes have been litigated extensively in the lower courts. Only the Sixth Circuit has agreed with Texas that specialty license plates represent a form of pure government speech that is outside the scope of the First Amendment entirely. Every other Circuit to consider the question has properly concluded that specialty license plate programs include an important element of private speech that triggers, at a minimum, the First Amendment's protection against viewpoint discrimination.

In reaching this conclusion, some lower courts have adopted a four-factor test that considers the central purpose of the program at issue, the identity

of the literal speaker, the entity that retains editorial control over the speech, and the entity that bears ultimate responsibility for the speech. Those factors applied to this case amply support the decision below holding that Texas has created a forum for private speech through its specialty license plate program.

Once the government opens a forum for private speech, as it has done here, it is undisputed that two rules always apply: 1) the State may not engage in viewpoint discrimination, and 2) the State may not establish vague and indefinite standards that permit state officials to regulate speech with unfettered discretion. Texas has violated both rules. First, it undeniably engaged in viewpoint discrimination by denying SCV's request for a specialty license plate on the grounds of offensiveness. Second, a standard that permits the State to deny a specialty license plate if "the design might be offensive to any member of the public" is no standard at all, and invites the kind of viewpoint discrimination that occurred in this case.

Finally, nothing in the decision below prevents Texas from adopting viewpoint-neutral rules to disassociate itself from the message conveyed by the SCV specialty license plate.

ARGUMENT

I. TEXAS' SPECIALTY LICENSE PLATE PROGRAM IMPLICATES PRIVATE SPEECH RIGHTS.

A. Specialty License Plates Contain Hybrid Speech.

Whether Texas' specialty license plates comprise government or private speech lies at the heart of this case, because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). In other words, Respondents have a First Amendment claim only if the messages on specialty license plates express the views of private individuals.

Specialty license plates present a situation unlike other First Amendment issues previously before the Court: one in which private speech and government speech are entwined. Most circuit courts to have considered this issue have concluded that specialty license plates involve a mixture of private and government speech. *See Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009) (noting that "both the state and the sponsoring organization exercise some degree of editorial control over the messages on specialty plates"); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (specialty license plates implicate both government and private speech); *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008) (same); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004) (stating that "Choose Life" license plate "appears to be neither

purely government speech nor purely private speech, but a mixture of the two").

Some lower courts have characterized the content of specialty license plates to be "hybrid speech,"[4] a theory the Court has yet to consider.[5] Characterizing Texas' specialty license plate program as a hybrid scenario reflects its complexity more accurately than labeling it as encompassing purely governmental or purely private speech. Indeed, the

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[4] *See Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 244–45 (4th Cir. 2002) (suggesting that it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government, and that a speech event cannot be *both* private and governmental at the same time. . When the Supreme Court is finally confronted with the case in which this elaboration upon its 'government speech' doctrine is compelled, I am convinced that our court in turn will, upon reflection, conclude that at least the particular speech at issue in this case is neither exclusively that of the private individual nor exclusively that of the government, but, rather, hybrid speech of both.") (Luttig, J., *respecting the denial of rh'g en banc*).

[5] *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 618, 618 (4th Cir. 2002) [hereinafter *SCV I*] (noting that "there exists some controversy over the scope of the government speech doctrine"); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001) ("The Supreme Court has provided very little guidance as to what constitutes government speech."); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1 377, 1509 (2001) (recognizing "theoretical confusion" in the government speech doctrine).

problem with having only two polar choices is illustrated by the Fifth Circuit's decision in this case.

In the opinion below, *both* the majority and the dissent based their conclusions on the Court's reasoning in *Summum*, 555 U.S. 460 (finding government speech in selection of donated monuments for a public park), and *Johanns*, 544 U.S. 550 (deciding advertisement funded by assessment on beef producers was not susceptible to a First Amendment compelled-subsidy challenge).[6] But neither *Summum* nor *Johanns* involved hybrid speech, and the Court's holdings were explicit on that point.[7] As the Court anticipated in *Summum*, it is now faced with a situation in which it is "difficult to

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[6] Petitioner's contention that the correct standard is whether the State maintains "effective control" of the speech is constitutionally untenable and would lead to absurd results if used as a stand-alone test. It would allow the government to free itself from the restrictions of the First Amendment simply by giving itself the authority to approve or disprove of particular speech. With this circular standard, the State would have the power to rubber stamp its own discriminatory practices.

[7] Both decisions specifically disclaimed any application to hybrid speech scenarios. In *Summum*, the Court noted that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech." 555 U.S. at 470. Likewise, in *Johanns*, the Court explicitly noted that it was not addressing a hybrid speech issue: "The message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560.

tell whether a government entity is speaking on its own behalf or is providing a forum for private speech." 555 U.S. at 470. The Court should take this opportunity to provide guidance to the lower courts on how best to analyze the constitutional questions presented when a state invites private individuals to express private messages on government property.

The circuits have adopted a variety of tests to distinguish between government and private interests in hybrid speech situations. Though the tests vary, their application to the context of specialty license plates has overwhelmingly resulted in the conclusion that such plates contain private speech protected by the First Amendment.[8] Some

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[8] *See Vandergriff II*, 759 F.3d at 395–96; *Tata*, 742 F.3d at 575; *Roach*, 560 F.3d at 868; *Choose Life Ill.*, 547 F.3d at 855; *Stanton*, 515 F.3d at 968. Though not reaching the merits, the Eleventh Circuit also "fail[ed] to divine sufficient government attachment to the messages on Florida specialty license plates to permit a determination that the messages represent government speech." *Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003). Also, the Second Circuit analyzed the recall of a "SHTHPNS" vanity plate as a restriction "concerning private individuals' speech." *Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001). In short, the State's assertion that specialty license plates constitute government speech has been rejected by seven circuits.

The Sixth Circuit stands alone in holding that specialty license plates constitute government speech unprotected by the First Amendment. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379–80 (6th Cir. 2006). Every appellate court to consider whether First Amendment protections apply to specialty license plates since *Bredesen* has disagreed with the Sixth Circuit's logic—often explicitly. *See Vandergriff II*, 759 F.3d at 396 (declining "to follow *Bredesen* because the Sixth Circuit's analysis cannot be reconciled with Supreme Court precedent");

circuits have adopted Justice Souter's "reasonable observer" test: "whether a reasonable and fully informed observer would understand the expression to be government speech." *Summum*, 555 U.S. at 487 (Souter, J., concurring). Other courts apply a four-factor test. To determine whether speech belongs to the government, private parties, or both, the four-factor test looks to:

> 1) the central "purpose" of the program in which the speech in question occurs;
>
> 2) the degree of "editorial control" exercised by the government or private entities over the content of the speech;
>
> 3) the identity of the "literal speaker"; and
>
> 4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech.

SCV I, 288 F.3d at 618. Because the four-factor test focuses on the nature and history of the challenged program, which the reasonable observer is presumed to know, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

Roach, 560 F.3d at 867 (rejecting Sixth Circuit approach in favor of that adopted by the Fourth, Seventh, and Ninth Circuits); *Choose Life Illinois*, 547 F.3d at 863 (same); *Stanton*, 515 F.8d at 963–64 (agreeing with Judge Martin's dissent in *Bredesen*).

290, 308 (2000), it is hardly surprising that both tests have led to the same result in this context.[9]

The four-factor test has been applied in varied factual circumstances, and permits the courts to assess the complex ways in which individuals and government commingle their speech. Application of the four-factor test in the context of specialty license plates has consistently and correctly found that private speech elements predominate.[10] *See Tata*, 742 F.3d 563 (using four-factor test to analyze North Carolina's specialty plate program, resulting in a private speech determination); *Rose*, 361 F.3d 786 (concluding that as applied to South Carolina's specialty plate program, the "four-factor test

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[9] In *Bredesen*, the Sixth Circuit did not apply either the reasonable observer test or the four-factor test, but instead reasoned that "[s]o long as Tennessee sets the overall message and approves [a specialty license plate's] details, the message must be attributed to Tennessee for First Amendment purposes." 441 F.3d at 377.

[10] In other contexts, the four-factor test has produced different results. *See Wells*, 257 F.3d 1132 (analyzing corporate sponsorship sign of city holiday display according to four factors and deciding that sign comprised government speech); *Downs v. L. A. Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (applying similar reasoning in deciding school's bulletin boards are government speech); *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085 (8th Cir. 2000) (using four-factor test to decide that announcements of sponsors' names on public radio station constituted government speech). *But see Cimarron Alliance Found. v. City of Oklahoma City, Okla.* 290 F. Supp. 2d 1252 (W.D. Okla. 2002) (using four factors to determine that city's program for displaying banners on utility poles did not constitute government speech).

indicates that both the State and the individual vehicle owner are speaking"); *Stanton*, 515 F.3d 956 (applying four-factor test to decide Arizona's "special organization license plate program" was predominantly private speech and thus regulation had to be viewpoint-neutral).

B. The Four-Factor Test Leads to a Result Consistent with Overwhelming Circuit Court Precedent and Reflects the Nuances of Hybrid Speech.

As noted above, the four-factor test assesses: 1) the purpose of the program where the speech occurs, 2) the division of editorial control, 3) the identity of the literal speaker, and 4) who bears ultimate responsibility for the content of the speech. As applied to Texas' specialty license plates, each of the four factors weighs in favor of a finding of predominately private speech.

1. The central purpose of the specialty license plate program is to encourage Texas drivers to pay an additional fee in exchange for the right to express a message that they have chosen, not to disseminate a message that the State has crafted.[11] As the district court determined—and the State concedes—Texas offers personalized license plates to raise revenue.[12] The means for the State to raise this

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[11] In that regard, it is surely revealing that Texas offers license plates supporting out-of-state universities and sports teams, including such archrivals as the University of Oklahoma.

[12] For each specialty plate, the DMV keeps $8 to cover administrative costs. It then issues the remaining $22 to the

revenue is to allow private citizens to choose a license plate design to their liking, thereby expressing a particularized message everywhere they drive. This incentive scheme is clearly demonstrated on the State's DMV website, which states, "Specialty license plates give your vehicle a *personal* touch."[13] *See also Stanton*, 515 F.3d at 967 (stating "the revenue raising purpose of the Arizona special organization plate program supports a finding of private speech"); *SCV I*, 288 F.3d at 619–20 (deciding that primary purpose of Virginia's specialty plate program is to collect revenue, indicating private speech).

2. The record indicates that the State maintains only limited "editorial control" over specialty license plates. Instead, the idea for the plate and the design itself both originate with the non-profit organization that seeks to promote its message. There is no provision for the DMVB, or any other state agency, to engage with an applicant to edit or contribute to the substance of its license plate design. As the district court noted, the DMVB's input is "limited to (1) technical reformatting of a design to enable it meet [sic] visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a

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sponsoring state agency, if any, which passes a portion to the non-profit organization. Tex. Transp. Code Ann. § 504.801(e) (West). If no sponsor was named, the remainder goes to the state highway fund. *Id.*; *see also Vandergriff I*, 2013 WL 1562758 at *17 n.15.

[13] Texas Dep't of Motor Vehicles, http://txdmv.gov/motorists/license-plates (last visited Feb. 12, 2015) (emphasis added).

specialty plate." *See Vandergriff I* at *2; *see also* 43 Tex. Admin. Code § 217.28(i)(8). Thus, the editorial control prong leads to a conclusion that the speech on specialty license plates should be attributed to the private parties who design them. *See Stanton*, 515 F.3d at 966; *Wells*, 257 F.3d at 1142.

3. The third factor, which looks to identify the speaker of the hybrid speech, also leads to the conclusion that the specialty plate message is expressed by a private party—the driver who decides to purchase and display the plate on her private vehicle. This result is consistent with the holding in *Wooley v. Maynard*, in which the Court held that New Hampshire residents have the right to cover the state motto, "Live Free or Die," on standard-issue license plates. 430 U.S. 705, 717 (1977). In overturning Mr. Maynard's convictions for violating a statute that made it a misdemeanor to obscure the state motto, the Court held the statute unconstitutional because it "in effect require[d] that appellees use their private property as a 'mobile billboard' for the State's ideological message." *Id.* at 715. In this case, the fact that the State owns and manufactures specialty license plates certainly gives rise to some government speech interest. But the decision to select, purchase, and display a particular message is made solely by the car owner. Because *Wooley* deems even a standard-issue license plate to implicate private speech interests when displayed on a personal vehicle, the literal speaker of the message on a specialty license plate is surely the private party who has chosen to convey that speech. *See Perry*, 280 F.3d at 166 (stating that a restriction on vanity plates "concern[ed] private individuals' speech on government-owned property"); *Rose*, 361 F.3d at 793–

94 ("The literal speaker of the Choose Life message on the specialty plate therefore appears to be the vehicle owner, not the State, just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker.").

4. Finally, the question of who bears the "ultimate responsibility" for the content of the specialty license plates is closely related to whether the government or a private party is the literal speaker. *See Rose*, 361 F.3d at 793–94; *Stanton*, 515 F.3d at 967. In *Wells*, the court found the government's ownership of a means of communication to be an important indicator of government speech. 257 F.3d at 1143. However, in light of the Court's holding in *Wooley*, courts have determined government ownership of specialty license plates to be less indicative of ultimate responsibility than the actions of private individuals who create and support their messages. *See SCV I*, 288 F.3d at 621 ("[T]he parties do not dispute here that Virginia continues to own the special plates at all times. Importantly, though, the special plates are mounted on vehicles owned by private persons, and the Supreme Court has indicated that license plates, even when owned by the government, implicate private speech interests ").

In Texas, a non-profit organization determines the design, submits the application, and carries the burden of funding the first 1000 license plates. After production, an individual driver selects the specialty plate from a range of options, pays a premium to obtain, renew, and secure the plate, and displays it on her vehicle. As such, private parties are ultimately responsible for the speech. *See Rose*, 361

F.3d at 794 ("Although the Choose Life plate was made available through state initiative, the private individual chooses to spend additional money to obtain the plate and to display its pro-life message on her vehicle.").

* * *

The four-factor analysis balances the competing interests in specialty license plate programs, which include elements of private and governmental speech to varying degrees. Texas' program, however, firmly tilts this balance to one side, compelling the conclusion that private speech interests—and the First Amendment—are at issue.[14]

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[14] The reasonable observer test produces the same conclusion. First, a reasonable observer with knowledge of the program would understand the four factors discussed above and appreciate their significance. *See supra* section I.B. Second, and more simply, the reasonable observer would understand that most cars do not have any specialty license plate, and those that do carry a range of messages selected by their owners, undermining the claim that the State is trying to deliver its own consistent message.

II. TEXAS OPENED A FORUM FOR PRIVATE SPEECH THAT MAY NOT BE REGULATED ON THE BASIS OF VIEWPOINT.

A. By Offering a Means for Organizations to Promote Personalized Messages, Texas Created a Forum for Private Speech.

The scope of the First Amendment's protection for speech turns on the nature of the forum in which it is expressed. The Court has identified three types of fora deserving of First Amendment protection: the traditional public forum, the designated public forum, and the nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45–7 (1983). But no matter what type of forum the State has created, one thing is clear: The government may not pick and choose private speech on the basis of viewpoint.

To be sure, government property does not become a forum for private expression "simply because it is owned or controlled by the government." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Nor will the Court "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 803 (1985). Finally, the Court may decline to engage in forum analysis when the property at issue is not "capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Summum*, 555 U.S. at 478.

None of those concerns is present here. The State's offer of specialty plates for profit contrasts sharply with the limited space in a public park that led to the Court's rejection of a forum analysis in *Summum*; nothing in the record suggests any limit on the number of plates that may be produced so long as a private organization bears the cost. Nor is it credible to assert that personalized message-bearing license plates could be inconsistent with expressive activity—to the contrary, the specialty plate program's profitability turns on the opportunity for individualized expression.

Furthermore, this case does not present the risk of holding individuals on government property as "a captive audience," a concern that led the Court to hold that advertising space inside public buses is not a protected forum:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.

Lehman v. City of Shaker Heights, 418 U.S. 298, 303–4 (1974). In this case, the spaces for specialization on license plates are essentially mobile mini-fora that neither give rise to a danger of state favoritism nor implicate any proprietary concern.

In sum, the district court properly concluded that by offering non-profit organizations the opportunity to design license plates to promote their causes, Texas created a forum for private speech.[15] This result is consistent with, if not dictated by, the conclusion that the speech at issue on these plates is predominately private.[16]

B. The First Amendment Prohibits Viewpoint Discrimination in a Government-Created Forum, No Matter How Repugnant the Viewpoint.

The Court has ruled that the First Amendment prohibits viewpoint-based discrimination of private speech. The State "must abstain from regulating speech when the specific

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[15] The district court identified Texas' specialty license plate program as a "nonpublic" forum, *Vandergriff I*, 2013 WL 1562758 at *10. The Court has sometimes referred to a limited public forum where government property has been made available to some speakers or for certain subjects without being open to indiscriminate use for private expression. *See e.g. Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Any difference between a nonpublic forum and a limited public forum is immaterial in this context, however, because viewpoint discrimination is prohibited in both. *See id.* at 829–30; *Cornelius*, 473 U.S. at 811–12.

[16] Of course, *unconstitutional* limitations on speech cannot support the government's arguments that it has not opened a forum for private speech. *See Cornelius*, 473 U.S. at 802–03 ("The policy evidenced a clear intent to create a public forum, notwithstanding the University's erroneous conclusion that the Establishment Clause required the exclusion of groups meeting for religious purposes.") (discussing *Widmar v. Vincent*, 454 U.S. 263 (1981)).

motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829. Even in a nonpublic forum, the government may only create restrictions on speech that are "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46. Yet the Texas law authorizing its specialty plates contains a provision explicitly permitting viewpoint discrimination: The DMVB "may refuse to create a new specialty license plate if the design might be offensive to any member of the public." Tex. Transp. Code Ann. § 504.801(c) (West).

The State's discomfort with the Confederate battle flag, historically a symbol of white supremacy, is both eminently understandable and an unconstitutional basis for rejecting SCV's message. *See Johnson*, 491 U.S. (striking down flag desecration statute on First Amendment grounds).

A specialty license plate bearing the Confederate flag undoubtedly evokes strong emotions in the public, particularly considering the State's own troubled history. Over 30,000 Texans reportedly contacted the DMVB regarding SCV's plate in order to ask the Board to reject the "racist relic."[17] In advance of the DMVB's meeting to vote on SCV's proposed design, several Texas officials sent letters urging the Board to vote against it, including nineteen state representatives and the mayor of

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[17] Mark Corcoran & Phillip Martin, *We Won: Confederate Flag Rejected*, Progress Texas, Nov. 11, 2011, http://progresstexas.org/blog/we-won-confederate-plate-rejected.

Houston. *Vandergriff I*, 2013 WL 1562758 at *6. Several state officials testified, including State Senator Royce West, who said, "Why should we, as Texans, want to be reminded of a state-sanctioned system of segregation and repression?"[18] Even Governor Rick Perry, who fought against the removal of bronze plaques with symbols of the Confederacy from the state supreme court, spoke against the license plate design, stating, "We don't need to be scraping old wounds."[19] Faced with this passionate response, the DMVB voted unanimously to reject SCV's application.

Understandable as the DMVB's decision may have been, there is no question that the animosity towards SCV's message constitutes viewpoint discrimination. The DMVB's stated reason for denying the plate design, pursuant to Tex. Transp. Code Ann. § 504.801(c) (West), was that "many members of the general public find the design offensive." *Vandergriff I*, 2013 WL 1562758, at *6.

Like the Fifth Circuit, every court of final appeal to grapple with a state's rejection of SCV's design has found impermissible viewpoint

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[18] Mike Ward, *Vehicle Board Rejects Proposal for Confederate Flag License Plate*, Austin Am. Statesman, Nov. 10, 2011, http://www.statesman.com/news/news/state-regional-govt-politics/vehicle-board-rejects-proposal-for-confederate-fla/nRg66/.

[19] Sommer Ingram, *Perry Doesn't Want Confederate Flag License Plates*, Dallas Morning News, Oct. 26, 2011, http://www.dallasnews.com/news/politics/perry-watch/headlines/20111026-perry-doesnt-want-confederate-flag-license-plates.ece.

discrimination. *See Vandergriff II*, 759 F.3d at 397–98 ("We agree with Texas SCV and hold that the Board engaged in impermissible viewpoint discrimination and violated Texas SCV's rights under the First Amendment."); *Sons of Confederate Veterans, Inc. v. Atwater*, 2011 WL 1233091, at *1 (M.D. Florida 2011) (holding discrimination against Confederate flag design viewpoint-based); *SCV I*, 288 F.3d at 626 (same); *Sons of Confederate Veterans, Inc. v. Glendening*, 954 F Supp. 1099, 1105 (D. Maryland, 1997) (same).

However reasonable this distaste for a symbol of racism, the Constitution does not permit the State to discriminate against messages in a forum it has created for private speech.

C. Texas Has Other Options to Advance its Stated Interests Without Engaging in Viewpoint Discrimination.

The State is not without recourse in addressing concerns about offering a platform for a message it understandably opposes, so long as those means are viewpoint-neutral. In *Cornelius*, the Court recognized:

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic

> forum and hinder its effectiveness for its intended purpose.

473 U.S. at 811; *see also Perry Educ. Ass'n*, 460 U.S. at 49 (stating that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity."). Accordingly, the First Amendment permits the State at least the following options for regulating private speech in a limited or nonpublic forum: 1) establish content-neutral rules; 2) use its own government soapbox to express disapproval of certain designs; 3) shut down the specialty license plate program; or 4) establish reasonable and non-pretextual content-based rules.

First, the State may add to its existing content-neutral rules for license plate speech.[20] If the

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[20] The current rules allow the DMVB to consider the following factors when reviewing an application for a new specialty plate:

> (B) the proposed license plate design, including:
>
> (i) whether the design appears to meet the legibility and reflectivity standards established by the department;
>
> (ii) whether the design meets the standards established by the department for uniqueness;
>
> ...
>
> (v) whether a design is similar enough to an existing plate design that it may compete with the existing plate sales; and
>
> (C) the applicant's ability to comply with Transportation Code[] § 504.702 relating to the required deposit or application that must

State is concerned about the perception that it supports messages on specialty plates, the State may mandate a design that more clearly delineates the private speech included on any plate. These may include font type, size, or color requirements; a consistent border surrounding all specialty designs; or even an explicit disclaimer such as "The State of Texas Does Not Endorse This Message." By using such tools, the State can make plain that "the message is one of neutrality rather than endorsement." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 248 (1990).

In addition, the State can express its opposition to racism, SCV, or the Confederate flag through state websites, legislative decrees, or publicity campaigns—including those funded through revenue from its specialty plate program. *See Widmar*, 454 U.S. at 274 n.14 (noting that inference of University support for religious groups using a school meeting place was unlikely where student handbook stated that University does not identify with aims of any organization or its members).[21]

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be provided before the manufacture of a new specialty license plate.

43 Tex. Admin. Code § 217.28(i)(5)(B)–(C).

[21] *See also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("To the plurality's consideration of the open nature of the forum and the private ownership of the display, however, I would add the presence of a sign disclaiming government sponsorship or endorsement on the Klan cross, which would make the State's role clear to the community. This factor is important because,

Texas could also shut down its specialty license plate program. Or, should the Court agree with the district court that the specialty license plate program creates a nonpublic forum, the State has leeway to create reasonable, content-based regulations so long as they are not a pretext for viewpoint discrimination.[22] *See e.g., Cornelius*, 473 U.S. at 809 (excluding "legal defense and political advocacy organizations" from charity drive was facially constitutional). The Court has been vigilant in ensuring that rules restricting content do not become a smokescreen for prohibiting controversial viewpoints. *See id.* at 811 (stating, "The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination."); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001) (deciding school

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as Justice Souter makes clear, certain aspects of the cross display in this case arguably intimate government approval of respondents' private religious message—particularly that the cross is an especially potent sectarian symbol which stood unattended in close proximity to official government buildings. In context, a disclaimer helps remove doubt about state approval of respondents' religious message.") (internal citations removed).

[22] Notably, however, the State may not now create a content-based regulation of its license plate program that is actually intended to limit the *viewpoint* of SCV, or any other party. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 736 (1982) ("The adoption of a facially neutral policy for the purpose of suppressing the expression of a particular viewpoint is viewpoint discrimination.").

policy prohibiting use of facilities "for religious purposes" was viewpoint discrimination).

III. THE FIRST AMENDMENT DOES NOT PERMIT STANDARDLESS DISCRETION IN REGULATING SPEECH.

Texas' specialty license plate program also facially violates the First Amendment because it grants state officials unbridled discretion in determining which plates to permit or reject. This constitutional infirmity results from Texas' regulatory language permitting the DMVB to reject any plate "if the design *might* be offensive to *any* member of the public." Tex. Transp. Code. Ann. § 504.801(c) (West) (emphasis added). This lax standard allows officials to both use a vague "offensiveness" standard to reject a plate and to improperly guess the degree to which a member of the public might wish to veto the speech. The First Amendment does not permit such a limitless metric for regulating private speech.[23]

The Court has consistently required licensing statutes regulating speech to include clear guidelines to ensure that officials do not grant or deny permits in an *ad hoc* fashion. In *City of Lakewood v. Plain Dealer Publ'g Co.*, the Court stated:

> At the root of this long line of precedent is the time-tested knowledge that in the

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[23] Even in cases in which the speech at issue is predominantly governmental and there is no public forum, as in *Lehman*, speech may not be regulated in an "arbitrary, capricious, or invidious" manner. 418 U.S. at 303.

> area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.

486 U.S. 750, 757 (1988). The prohibition on unchecked discretion applies fully in any forum, because it leads to viewpoint discrimination. *See Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000) (remanding question of access to nonpublic forum because it was "unclear what protection, if any, there is for viewpoint neutrality"); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 304–05 (holding that nonpublic forum of student election system provided "insufficient safeguards [for] diverse student speech"). As the Court has noted, "the absence of express standards makes it difficult to distinguish, as applied, between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *City of Lakewood*, 486 U.S. at 758.[24]

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[24] Additionally, the Court has examined statutes that vest unbridled discretion to regulate speech under the Due Process Clause as a vagueness or overbreadth issue. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of clarity is especially stringent when a law interferes with First Amendment rights. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'") (quoting *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)). The Constitution requires the State to define restrictions on speech with clarity to both ensure fairness and avoid viewpoint discrimination.

Furthermore, the Court has held that regulations that are dependent upon the public's reaction to the speech violate the First Amendment. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–71 (1997) (holding that the Communications Decency Act's prohibitions on "indecent" and "offensive" speech provoke uncertainty and undermine the statute's stated goal of protecting minors); *Forsyth Cnty., Ga., v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (finding permitting fee ordinance tied to listeners' reaction to speech facially invalid in part because "[n]othing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees"); *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 154–155 (1969) (determining city commission's authority to regulate assembly based on "public welfare, peace, safety, health, decency, good order, morals or convenience" allowed it to "unwarrantedly abridge the right of assembly") (internal quotations removed). The Court should not allow the Texas DMVB to continue discriminating against the views of its license plate applicants pursuant to an unconstitutionally vague standard.

CONCLUSION

For the reasons stated above, the judgment of the Fifth Circuit Court of Appeals should be affirmed.

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IN THE
Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,
Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief of *Amicus Curiae* Americans United for Separation of Church and State Supporting Respondents

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INTEREST OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C.* Its mission is to protect the rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic governance. Americans United has more than 120,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by this Court and the lower federal courts.

In this case, Americans United is concerned that extending the government speech doctrine to cover the messages found on private, specialty license plates would diminish the right to free expression by unpopular minorities, including religious minorities. Americans United files this brief to ensure that the First Amendment serves its proper role in protecting the expression of minority groups, even those whose beliefs the majority finds offensive.

SUMMARY OF ARGUMENT

For most purposes, Texas treats the messages on specialty license plates as private expression: citizens are permitted to display a variety of messages,

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* Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by Petitioners and Respondents. Pursuant to Supreme Court Rule 37.6, *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

including those promoting private fast-food chains and rival universities from out of state; Texas officials do not pretend that these messages reflect the government's views and do not have to answer to the electorate for supporting the messages' content. Indeed, Texas advertises the chance "to get *your* specialty license plate on the road." Texas Dep't of Motor Vehicles, *Proposing a Specialty License Plate* (2012), *available at* http://tinyurl.com/brochuretx.

But in this case, Texas wants to censor a private message because "many members of the general public find [it] offensive." Pet. App. 69a. In order to escape First Amendment liability for that censorship, Texas must pretend that the message is actually the work of the state—even though nobody would actually understand it as such.

The government-speech doctrine lets the government take ownership of—and responsibility for—its own messages. But the doctrine does not allow the government to escape liability for suppressing private opinions. The private messages on specialty license plates do not become government speech merely because Texas claims the right to censor them; "were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to ... silence dissenting ideas." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

For two reasons, the Court should be especially wary of Texas's argument that the speech at issue is its own. First, Texas and several of its supporters have behaved opportunistically when it comes to labeling particular forms of speech as private or governmental. When seeking to enable speech to proceed and avoid liability under the Establishment Clause,

Texas advances a broad definition of private speech, even when the speech at issue reflects ample government involvement. Here, conversely, when it seeks license to *censor* expression, Texas advances a narrow cramped of private speech. If accepted, the state's inconsistent characterization of speech would turn the First Amendment into a moving target that serves to authorize government conduct in all cases.

Second, if the Court were to allow the government to pretend that private speech is actually the work of the state, the government would have dangerous latitude to censor unpopular opinions. Actual government speech is treated as such because the state is politically accountable for its views. But here, Texas is attempting to control messages without any accountability: few if anyone would understand these hundreds of private license-plate messages to reflect an actual government position.

If the state may censor speech that "many members of the general public find ... offensive," the result could be especially harmful to religious minorities. Recent events have highlighted that both public officials and members of the public are sometimes offended by minority religious views that are not widely or properly understood. This type of prejudice against religious minorities has already found its way into rejections of vanity plates in other states. Moreover, if the messages on specialty plates actually come from the government, private religious expression—including religious license plates that Texas *has* approved—would be vulnerable to challenge under the Establishment Clause, as could the state's decision to direct proceeds from these plates to religious organizations.

The Court has warned that the government may not arbitrarily reclassify speech for the purpose of censoring it, "lest the First Amendment be reduced to a simple semantic exercise." *Agency for Int'l Development v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (quoting *Legal Serv's Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)). Just as Texas may not censor dissenting voices directly, it may not do so by slapping a "government speech" decal on its citizens' cars.

BACKGROUND

Like many states, Texas has created a specialty license plate program. Pet. App. 4a. Through the program, vehicle owners may opt for one of over 350 license plates containing a message different from the state's standard-issue plate. *Id.* at 14a. Part of the proceeds from each specialty plate goes to the government, and part of the proceeds goes to "the entity which proposed the plate." *Id.* at 56a.

There are three ways for a Texas resident to obtain a specialty license plate. *Id.* at 2a. First, specialty plates may be specifically authorized by the legislature itself. *Id.* Second, "any individual or organization can create a specialty plate through a third-party vendor." *Id.* at 2a–3a. Finally, the Texas Department of Motor Vehicles (DMV) may issue a new specialty plate on its own or "in response to an application from a nonprofit organization." *Id.* at 3a.

In promoting the program, Texas advertises the chance "to get *your* specialty license plate on the road." *Proposing a Specialty License Plate*, *supra* (emphasis added). But the state reserves the right to "refuse to create a new specialty plate if the design might be offensive to any member of the public." Pet. App. 3a.

The Texas branch of Sons of Confederate Veterans applied to the Texas Department of Transportation to create a specialty plate with the name of the organization and an image of a Confederate flag. *Id.* at 3a. After initially approving the license plate, the Department of Transportation reconsidered its vote and then rejected the design. *Id.* at 4a. DMV eventually assumed oversight of the specialty license plate program, and Sons of Confederate Veterans renewed its application; the DMV Board first deadlocked and then later voted to reject the proposed license plate. *Id.* In explaining its final decision, the DMV Board stated that "many members of the general public find the design offensive, and ... such comments are reasonable." *Id.* at 5a.

In justifying its decision to reject the proposed license plate on the ground that it is "offensive," Texas now claims that all specialty plates bear the state's message and it has merely "enlist[ed] private motorists to assist the State in conveying" those messages. Pet'r Opening Br. at 2. But even the most creative observer would strain to synthesize the hundreds of privately designed specialty plates into a coherent government view. Specialty license plates promote a vast array of companies, colleges, and causes. They advertise commercial entities such as "Mighty Fine burgers, Freeb!rds burritos, and RE/MAX ("GET IT SOLD WITH RE/MAX")." Pet. App. 60a. And they promote over a dozen out-of-state universities, including University of Alabama, University of Arkansas, Boise State, Florida State University, University of Illinois, Mississippi State, and University of Oklahoma. *See Specialty License Plates*, Texas Department of Motor Vehicles, http://tinyurl.com/platestx (all websites last visited Feb. 16, 2015).

In addition, some specialty plates convey religious messages or promote religious institutions. "[S]everal specialty plates—approved and available to the public—contain references to God, or Christian symbols." Pet. App. 84a. For instance, "the Calvary Hill plate features the legend 'ONE STATE UNDER GOD,' and, with obvious Christian symbolism, a silhouette of three crosses on a small rise." *Id.* at 61a. Other license plates promote religiously affiliated schools, including Brigham Young University, Liberty Christian School, University of Notre Dame, and Jesuit Dallas—"the Jesuit College Preparatory School of Dallas." *Specialty License Plates*, *supra*.

ARGUMENT

I. Texas Has Manipulated the "Government Speech" and "Private Speech" Labels.

Texas argues that specialty license plates constitute government speech rather than private speech. But in similar cases, with even more evidence of government involvement, Texas and its supporters have maintained that the speech at issue was fully private. When it needs to avoid liability under the Establishment Clause, Texas asserts that government-endorsed speech is actually private; when it wants to avoid liability under the Free Speech Clause, Texas insists that private speech is actually its own. In short, Texas appears to classify speech in whatever manner is necessary to evade legal constraint.

A. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court addressed whether a Texas school district's policy authorizing student-led prayer at high-school football games violated the Establishment Clause. *See id.* at 301. The Court concluded that the prayers were not private speech and

that they violated the Establishment Clause. *See id.* at 309–10, 316.

Unlike the speech at issue in this case, the prayers challenged in *Santa Fe* showed many signs of government control. The school district's policy contemplated that "invocations" would be delivered (subject to a student vote), and the invocations were "authorized by a government policy and take place on government property at government-sponsored school-related events." *Id.* at 302. The school district allowed "only one student, the same student for the entire season, to give the invocation." *Id.* at 303. The invocation was "subject to particular regulations that confine the content and topic of the student's message." *Id.* The school district's "policy, by its terms, invite[d] and encourage[d] religious messages." *Id.* at 306. The invocation was delivered to a captive audience assembled for a school event on school property, and was "broadcast over the school's public address system, which remains subject to the control of school officials." *Id.* at 307. And "the pregame ceremony [was] clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." *Id.* at 307–08.

Nonetheless, Texas argued that the religious messages at these school-sponsored events were private speech, protected by the Free Speech Clause and immune from scrutiny under the Establishment Clause. *See* Brief on the Merits of State of Texas et al. as Amici Curiae Supporting Petitioner, *Santa Fe*, 530 U.S. 290 (No. 99-62). In so doing, Texas advanced arguments which it now rejects. Texas claimed that "[t]he relevant actors are student speakers with no actual or apparent state authority."

Id. at 8. It maintained that "[n]o school official directs the performance of any formal religious exercise." *Id.* And it insisted that "[t]here is no official sanction for the speech, nor is there any endorsement." *Id.* Because labeling the speech "private" would have avoided liability under other constitutional provisions, Texas was willing to embrace a far broader definition of private speech than it offers here.

B. *Schultz v. Medina Valley Independent School District*, No. 11-50486 (5th Cir. June 3, 2011) (order vacating preliminary injunction), was another departure by Texas from the arguments it offers in this case. In *Medina Valley*, the Fifth Circuit examined prayers delivered by students at graduation ceremonies sponsored by a Texas school district. The government's control of the speech was even more apparent than in *Santa Fe*: the school selected only a few students to speak before a captive audience; the prayers were listed as an "invocation" and "benediction" in the graduation program; the prayers were pre-reviewed and pre-approved by school-district officials; and school-district leadership acknowledged in writing that school district graduation ceremonies "are overseen and supported by [the school district's] Board of Trustees." Brief of Appellees at 2–3, 6, 19, 27, 30, *Medina Valley* (No. 11-50486).

Yet again, Texas argued that student graduation prayers were private expression immune from scrutiny under the Establishment Clause and protected fully by the Free Speech Clause. Texas asserted that restrictions on prayers at school-sponsored graduation ceremonies would "threaten[ ] the right of Texas students to freely express their religious beliefs in public settings." Brief of the State of Texas as Amicus Curiae at 1, *Medina Valley* (No. 11-50486). Alt-

hough the school district instructed certain students to deliver "an 'invocation' and 'benediction,'" Texas claimed that these instructions from the government to the students did "nothing to alter the character of the speech—it remains student speech." *Id.* at 10.

Nothing—not the government's handpicking of the speakers; not the government's direction that speakers deliver an "invocation" and "benediction"; not the government's advance review and approval of those remarks; not the government's control over the graduation ceremony; and not the presence of a captive audience at a government event—caused Texas to question whether the prayers at issue were indeed private speech. Insisting that the graduation prayers were private would mean that the state's subdivisions could avoid liability under the First Amendment. Here, because labeling the speech private would subject the state to liability, Texas sings a different tune.

C. In *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), Texas again embraced a different, more expansive definition of private speech in order to avoid the risk of liability under the Establishment Clause. In *Town of Greece*, the Court addressed the constitutionality of predominantly Christian prayers before a local town board's meetings. *See id.* at 1815–16. Before each meeting, a chosen leader from a local congregation would give a prayer to solemnize the occasion. *Id.* at 1816. The prayers did not take place in the official "public forum" held later in the meetings. *see id.* at 1846–47 (Kagan, J., dissenting); instead, the government selected a lone speaker to deliver a prayer at each meeting, and the government placed the prayer "at the opening of legislative sessions, where it [was] meant to lend gravity to the occasion and reflect values long part of the Nation's heritage."

Town of Greece, 134 S. Ct. at 1823. The town "invit[ed] ministers to serve as chaplain for the month, and welcom[ed] them to front of the room alongside civic leaders." *Id.* at 1827. Although the parties disputed the extent to which the government could limit content of the prayers, all agreed that prayers could not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers*, 463 U.S. 783, 794–95 (1983).

Again, Texas argued that the invocations were private speech, not government speech. Brief of Indiana, Texas, and Twenty-One Additional States as Amici Curiae in Support of the Petitioner at 13, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696). Texas was joined in *Town of Greece* by four additional states (Arkansas, Colorado, Indiana, and Ohio) that also support Texas in this case. *Compare id.*, *with* Amicus Brief of Ohio et al. These states argued that the prayers at issue in *Town of Greece* were "citizen speech," Brief of Indiana, Texas, and Twenty-One Additional States as Amici Curiae in Support of the Petitioner at 15, *Town of Greece*, 134 S. Ct. 1811 (No. 12-696), even though the prayers were delivered at the request of local governments and speakers were directed to give an invocation and only an invocation. Fearing liability under the Establishment Clause, Texas and its supporters urged the Court to "reject the assumption that the content of private citizens' prayers before legislative assemblies is attributable exclusively to the government." *Id.* at 13.

D. Other states supporting Texas in this case have been equally opportunistic in their litigating positions—again, insisting that certain speech was private speech even when it reflected far more government sponsorship than the speech at issue here.

In *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), the Tenth Circuit held that the Establishment Clause prohibited the state of Utah from displaying prominent memorial crosses placed by a private organization on public land. *See id.* at 1111. Yet several states, including two that support Texas in this case, told the Court of Appeals that the speech at issue was private.

In *Davenport*, a private patrol association received permission from the State of Utah to install several 12-foot-tall white crosses to memorialize fallen police officers. *See id.* at 1111. These crosses were displayed "on public property, including the rights-of-way adjacent to the State's roads, roadside rest areas, and the lawn outside a [Utah Highway Patrol] office in Salt Lake County." *Id.* at 1112. The government "continue[d] to own and control the state land on which some of the memorials are located." *Id.* These were "permanent monuments erected on public land"; no monument had been removed from public land in the over ten years since the program began. *Id.* at 1114, 1116. And the crosses bore the official insignia of the Utah Highway Patrol, a government agency. *See id.* at 1115.

Colorado and New Mexico have joined an *amicus* brief in this case arguing that the specialty license plates in Texas are government speech that is unprotected by the First Amendment. *See* Amicus Br. of Ohio et al. But in *Davenport*, they joined a brief arguing that the challenged memorials—permanent monuments housed on government land and bearing the insignia of a government agency—were private speech. Brief Amici Curiae of the States of Colorado, et al. in Support of Appellees at 3, *Davenport*, 637 F.3d 1095 (No. 08-4061). Unlike in this case, they argued that the speech at issue in *Davenport* should be

free of regulation: "the First Amendment," they claimed, "prohibits Utah from discriminating against them because of their religious (or allegedly religious) viewpoint." *Id.* at 7.

* * *

Time and time again, Texas and its supporters have sought to classify speech not according to its actual character, but rather in a manner that minimizes the government's liability. Texas embraces an expansive definition of private speech when necessary to avoid liability under the Establishment Clause. But when it wants to censor certain viewpoints expressed by certain private speakers, Texas resorts to an equally expansive definition of government speech. There is no principled way to reconcile these positions; when it comes to classifying speech, the rule proposed by Texas is "the government wins."

II. Ruling for the State Would Facilitate Improper Censorship, Including Censorship of Religious Minorities.

If the government could on whim manipulate the classification of speech as governmental or private, the government could selectively employ the doctrine to shield itself from First Amendment scrutiny. The result would boost the government's latitude to impose majority opinions on unpopular minorities, and to hamstring the ability of unpopular minorities—including religious minorities—to participate in public discussion and debate. And because certain plates that Texas has approved convey religious messages, with some of the proceeds funding religious organizations, treating the specialty plates as government speech would raise serious concerns under the Establishment Clause.

A. Because the expression at issue in this case does not look anything like actual government speech, the implicit constraints imposed by the government-speech doctrine are missing from the specialty license plate program. The government-speech doctrine allows the state to avoid the requirements of viewpoint neutrality when the state, rather than a private party, is the speaker. If Texas decided, for example, which donated monuments to display in a state park, that message would be displayed on government property and attributed to the government. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 469–72 (2009). The same would be true if Texas were to direct a focused advocacy campaign promoting a particular industry, in which the legislature has "set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the [government]." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005).

There is an important political constraint, however, on actual government speech. "When the government speaks ... to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). But the political process cannot perform this function without a meaningful indication that the speaker is in fact the government. This important check—a clear nexus between the government and its purported message—is absent from the Texas license plate program.

There are over 350 privately designed license plates to choose from. Pet. App. 14a. Any given message appears not on a government building or website, but on "an automobile, which is readily associated with its operator." *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). If each of these hundreds of private messages were treated as government speech, Texas could have it both ways: it could control the message without owning its contents. And because the state allows all but a few proposed messages, the minority of speakers whose messages are excluded have little chance of rallying others to their cause.

Indeed, there is a good reason for Texas to operate at arms length from many of the specialty plates that it has authorized. Texas officials would pay a steep political price if they expressed the sentiments found on some of the specialty plates. Among other things, Texas has approved specialty plates that promote over a dozen out-of-state universities, including Texas archrival University of Oklahoma. Few Texas officials who wanted to be reelected would dare travel around the state shouting, "Go Sooners!"; it is hard to believe that these officials would deputize private citizens to send the same message on the state's behalf. *Cf.* Brian Ianieri, *Christie Doubles Down on Cheering for the Cowboys*, Press of Atlantic City (Dec. 16), http://tinyurl.com/cowboysnj (New Jersey governor faced "backlash" after appearing on TV rooting for the Dallas Cowboys); *Foul Ball: Coakley Calls Schilling "Another Yankee Fan,"* Wall St. J. Wash. Wire (Jan. 16, 2010, 4:12 PM), http://tinyurl.com/yankeesma (Massachusetts gubernatorial candidate committed "gaffe" by referring to Boston Red Sox hero Curt Schilling as "another Yankee fan"). When properly viewed as private speech,

however, the Sooners license plate makes sense: some Oklahoma alumni live in Texas, and they wish to show their school spirit.

Texas, in other words, counts on the public's awareness that these license plates reflect purely private messages. That is why Texas tells the public about its opportunity "to get *your* specialty license plate on the road." *Proposing a Specialty License Plate*, *supra* (emphasis added).

B. If the state could manipulate the government-speech doctrine to allow or exclude messages that "many members of the general public find ... offensive," religious minorities and nonbelievers would inevitably suffer the brunt of disfavor. "Offensiveness" is not self-defining, and recent events reinforce that religious minorities often encounter hostile majorities who find their beliefs offensive for no reason other than fear or unfamiliarity. If Texas could censor speech on that basis, unpopular religious minorities would lose the ability to express themselves on equal footing.

For example, forty-three percent of Americans admit to prejudice against Muslims. *See* Gallup, Inc., *Religious Perceptions in America* 4 (2009), *available at* http://tinyurl.com/gallupislam. Unfortunately, some public officials share these views. *See* Reeve Hamilton & Alexa Ura, *Rep to Staff: Ask Muslim Visitors to Pledge Allegiance*, Tex. Trib. (Jan. 29, 2015), http://tinyurl.com/muslimstx (Texas state representative had previously warned that "Muslims cannot be trusted no matter how peaceful they appear"); Jeremy Diamond, *Jindal: Some Muslims Trying to "Colonize" West*, CNN (Jan. 21, 2015), http://tinyurl.com/muslimsjindal. Groundswells of public and official offense have targeted Islamic cul-

tural centers, including one that would have resided a few blocks from the site of the September 11 attacks. *See, e.g.*, Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. Times (Aug. 7, 2010), http://tinyurl.com/mosquesny.

Muslims are not the only ones afflicted by community fear and offense. A Wiccan priest was initially disinvited from giving the invocation at a Huntsville, Alabama city-council meeting because of phone calls from citizens who were "alarmed." Kay Campbell, *No Wiccan Priest for Huntsville City Council Prayer? "Somebody Got the Collywobbles,"* AL.com (June 26, 2014), http://tinyurl.com/alwiccan. Half of Americans find atheism "threatening." James Hamblin, *Bullied for Not Believing in God*, The Atlantic (Sep. 13, 2013), http://tinyurl.com/atheismthreat. A Maryland state legislator recently said that allowing atheists to hold public office would be "offensive" to Christians. Laurie Goodstein, *In Seven States, Atheists Push to End Largely Forgotten Ban*, N.Y. Times (Dec. 6, 2014), http://tinyurl.com/atheismoffice.

Atheists have likewise faced discrimination when applying for license plates. Although the state of New Jersey would allow a vanity license plate bearing the message "BAPTIST," the state refused to issue a plate with the text "8THEIST" because it was deemed "offensive to good taste and decency." Complaint at 5–6, *Morgan v. Martinez*, No. 3:14-cv-02468-JAP-LHG (D. N.J. Apr 17, 2014); *see also* Elizabeth Landers, *Atheist Sues Over New Jersey License Plate Refusal*, CNN (Apr. 20, 2014), http://tinyurl.com/atheistnj. This was not the first time that the state had rejected an atheist message on the ground that it was "offensive." *See* Associated Press, *N.J. To Allow "ATHE1ST" License Plate After*

Worker Labeled It "Offensive," CBS N.Y. (Aug. 29, 2013), http://tinyurl.com/atheistnj2.

Under Texas's understanding of the law, however, the Free Speech Clause would have nothing to say about these situations. If the specialty license plates at issue were deemed government speech, then the state would be able to exclude messages that the majority deems "offensive." The government could use the force of law to censor the messages of political and religious minorities in order to validate community fears and prejudices, and members of these affected minorities would have no recourse under free-speech law.

C. Classifying the specialty license plates as government speech would also present serious concerns under the Establishment Clause. Texas allows several specialty plates with religious symbols or messages, and part of the proceeds from those license plates fund religious institutions. *See* Pet. App. 56a (part of proceeds from a particular specialty plate benefit "the entity which proposed the plate").

As the district court explained, "several specialty plates—approved and available to the public—contain references to God, or Christian symbols." *Id.* at 84a. For instance, "the Calvary Hill plate features the legend 'ONE STATE UNDER GOD,' and, with obvious Christian symbolism, a silhouette of three crosses on a small rise." *Id.* at 61a. Part of the proceeds from that specialty plate goes to Glory Gang, *Specialty License Plates*, *supra*, a religious group that provides at-risk kids with food, clothing, and "Biblical training." *About Us*, Glory Gang, http://tinyurl.com/glorygang. The Brigham Young University plate promotes and funds the school, which "provides education in an atmosphere con-

sistent with the ideals and principles of its sponsor, The Church of Jesus Christ of Latter-day Saints." *BYU Overview*, Brigham Young University, http://tinyurl.com/byufacts. Other plates promote and finance Liberty Christian School, University of Notre Dame, and "Jesuit Dallas"—"the Jesuit College Preparatory School of Dallas." *Specialty License Plates*, *supra*.

If Texas's argument were accepted, then the government—rather than private citizens—would be screening religious messages for "offensiveness," disseminating state-approved religious messages, and directing profits to religious organizations. Because Texas claims the authority to accept messages it deems appropriate and to reject messages it deems offensive, the religious messages and funding could not be said to result from neutral criteria. Under that regime, the plates would likely violate the Establishment Clause, which forbids government aid to religious institutions based on non-neutral grounds. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 813 (2000) (plurality opinion). If, instead, the views on specialty plates are treated as private speech, then any religious messages come from citizens, not the state, and any funding to religious organizations arises from independent, private choice. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

* * *

Texas has created a program for private entities to compose and display private messages on their private vehicles. Once it has done so, Texas cannot reclaim these private messages as government speech in order to justify the censorship of certain private views that it deems offensive. Such an approach would undermine the goals of the Free

Speech Clause and create significant risks for unpopular minorities, including religious minorities against whom prejudice often manifests as "offense."

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

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JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Is Texas's specialty license plate program either a limited public forum or a nonpublic forum, in either of which Texas must maintain viewpoint neutrality?

2. Has Texas remained viewpoint-neutral even though it has approved every other proposed license plate design, except the one at issue here, which Texas rejected because of its message?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has often advocated both as counsel and as *amicus curiae* for equal access to government funding and facilities for religious organizations. The Becket Fund does not agree with or support the use of the Confederate flag, on license plates or anywhere else; the Becket Fund opposes all racist messages. But the Becket Fund believes that adopting Texas's theory in this case—a theory under which governments could have broad authority to discriminate based on viewpoint in many programs—would give governments unprecedented and unwarranted leverage over religious groups' expression of their beliefs.

SUMMARY OF ARGUMENT

This case is about more than license plates and Confederate flags. Many government programs let private speakers access government resources—charitable tax exemptions, student loans and grants,

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. The parties have consented to this filing.

meeting spaces for student organizations, the postal service, and more. In creating such programs, the government "does not itself speak or subsidize [the] transmittal of a message it favors but instead [encourages] a diversity of views from private speakers." *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 834 (1995). If the government were then permitted to exclude certain viewpoints, it would acquire tremendous power to direct public debate and the exchange of ideas.

Texas argues that the speech here is government speech, not private speech. But this argument is an excellent illustration of the "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 473 (2009).

The Texas specialty license plate program contains more than 80 plates designed and submitted by private organizations. The viewpoints expressed include, among other things, boosterism for the University of Oklahoma and the Louisiana State University; advertisements for Mighty Fine Burgers, Freebirds Burritos, Dr. Pepper soda, and Re/Max real estate; and the statement that the driver would "Rather be Golfing."

All these license plates can be treated as "government speech" only if the simple fact of a government benefit (such as the one in *Rosenberger*) itself makes the speech into government speech—which is to say, only if the requirement of viewpoint-neutrality even in nonpublic fora and limited public fora is rejected.

To be sure, Texas states that it "'effectively control[s]' and exercises 'final approval authority' over the design." Petr. Br. 14 (*citing Summum*, 555 U.S. at 473). But Texas had never once rejected a design application before this case. Likewise, Texas states that a design may be rejected if it "*might* be offensive to *any* member of the public," Tex. Transp. Code § 504.801(c) (emphases added). Yet this limitation has also been largely abandoned by Texas. Surely designs featuring the Texas Trophy Hunters Association, "Choose Life," or "One State Under God" (with three crosses) *might* be offensive to *some* member of the public, yet such designs are currently available to any Texas motorist.

Nor can this case be distinguished from *Rosenberger* and the other "forum" cases on the grounds that the government must physically print the license plate. Printing and distributing a license plate is not materially different from providing physical space for speech (*Widmar* v. *Vincent*, 454 U.S. 263, 268 (1981), transporting speech through an internal mail system (*Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47-49 (1983), and subsidizing speech (as in *Rosenberger* or in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983)).

Indeed, this Court held in *Cornelius* v. *NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), that viewpoint neutrality is required in the Combined Federal Campaign, which raises charitable contributions from federal employees. Yet there the government itself printed statements of private organizations in the Campaign pamphlets. And this Court's ruling in *Lehman* v. *City of Shaker Heights*,

418 U.S. 298, 303 (1974), requires viewpoint neutrality when the government sells advertising space on city buses, *see R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 390 n.6 (1992), and thus has to display, mount, and likely print the ads, either itself or via a contractor.

ARGUMENT

I. Allowing exclusion of certain viewpoints from programs supporting private speech would give the government broad power to control public debate

Many government programs grant private speakers access to government resources. The charitable tax exemption is one example: this Court held in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 544 (1983), that the exemption is "a form of subsidy that is administered through the tax system."

Government-subsidized student grants and loans are another example. This Court has held that those programs provide benefits to universities as well as to students, because there is no "substantive difference between direct institutional assistance and aid received by a school through its students." *Grove City College* v. *Bell*, 465 U.S. 555, 564 (1984). Other familiar examples include meeting spaces for student groups, *Widmar*, 454 U.S. at 265, support for student newspapers, *Rosenberger*, 515 U.S. at 821, and more.

And this Court has rightly concluded that the government must let speakers participate in such programs without viewpoint discrimination. Thus, in *Regan*, this Court upheld a tax exemption provision

because the government had not discriminated "in its subsidies in such a way as to 'aim[] at the suppression of dangerous ideas.'" 461 U.S. at 548 (internal citation and internal quotation marks omitted). In *Rosenberger*, this Court likewise held that *Regan* "reaffirmed the requirement of viewpoint neutrality in the Government's provision of financial benefits." 515 U.S. at 834.

In *Widmar*, *Rosenberger*, and, most recently, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 102 (2001), this Court made clear that excluding religious messages from access to space or funding provided by a public school or university was unconstitutional viewpoint discrimination. And given that federal, state, and local governments now spend over 35% of the nation's Gross Domestic Product every year,[2] preserving this viewpoint neutrality mandate is necessary to protect public debate and the marketplace of ideas from undue governmental distortion.

Texas's specialty license plate program is akin to the tax exemption in *Regan*, the funding program in *Rosenberger*, and the access to meeting spaces in *Widmar* and *Good News Club*. In letting non-profit organizations design their own license plates, Texas has invited private organizations to express varied, diverse, and often conflicting messages on official Texas license plates. Indeed, Texas has accepted 89 specialty license plate applications from private organizations, J.A. 20, far more than the fifteen news-

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[2] *See* Office of Management & Budget, *Historical Tables* tbls. 1.2 & 15.2 (2011 data), http://www.whitehouse.gov/omb/budget/Historicals.

papers funded in *Rosenberger*, 515 U.S. at 825. And it has invited Texas drivers to choose from these privately designed plates to "give [their] vehicle a personal touch."[3]

These messages include support not just for Texas and Texas institutions, but also for major rivals of Texas institutions, such as the University of Oklahoma and the Louisiana State University. They include support for commercial products, such as Mighty Fine Burgers, Freebirds Burritos, Dr. Pepper soda, and Re/Max real estate. They include support for hobbies ("Rather be Golfing" and "Texas Trophy Hunters Association"). They include support for NASCAR drivers Dale Earnhardt and Jeff Gordon. It is hard to see how any of these designs promote an official view of the Texas government.

When the government grants members of the public such broad access to express their own views, the government "does not itself speak or subsidize [the] transmittal of a message it favors," but instead encourages "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. And *Rosenberger* and the other cases make clear that this sort of program may not then selectively exclude viewpoints that the government or the public views as offensive.

Texas argues that the specialty license plate program is not governed by these precedents because it is "government speech." As the heading to Part I.A of Texas's brief argues, "the government-speech doctrine permits states to limit speech that occurs with-

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[3] Texas Dep't of Motor Vehicles, *License Plates*, http://txdmv.gov/motorista/license-plates (last visited Feb. 1, 2015).

in the scope of a government-created program," Pet. Br. 17 (capitals changed to lowercase).

Yet the logic of that argument would essentially overturn the cases discussed above. After all, student publications, see *Rosenberger*, student group meetings in classrooms, see *Good News Club* and *Widmar*, and nonprofits' use of their tax exemptions, see *Regan*, all happen "within the scope of a government-created program." Under Texas's approach, all those cases would likewise be seen as government speech cases, and government viewpoint discrimination would be allowed in all those contexts.

Thus, for instance, say that a local acting company seeks to put on the play "Inherit the Wind" in a municipally owned theater. This Court has held that, when a city opens a city-owned theater as a venue for a wide range of productions, those municipally owned theaters cannot discriminate based on viewpoint.[4]

Yet if Texas's position were accepted, then the city could deny the group's application and explain, much like the DMV Board did in this case, that,

> [The city] finds it necessary to deny this [group's] application, specifically the ["Inherit the Wind"] portion of the design [displayed

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[4] *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975) (striking down exclusion of offensive material from such a theater); *NEA* v. *Finley*, 524 U.S. 569, 586 (1998) (noting that *Conrad* fell within the category of cases that, like *Rosenberger*, barred viewpoint discrimination in government programs that "'encourage a diversity of views from private speakers'" (citing *Rosenberger*, 515 U.S. at 824)).

> on the marquee], because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate[s] ["Inherit the Wind"] with organizations advocating hate directed toward people or groups that is demeaning to those people or groups.

Pet. Br. 6. *See, e.g.*, David Larsen, *The Religious Bigotry of "Inherit the Wind,"* EXAMINER.COM, Oct. 4, 2010, http://www.examiner.com/article/the-religious-bigotry-of-inherit-the-wind (claiming that the film "Inherit the Wind" contains "a continual thread" of "anti-Christian bigotry"). And the government could argue, like it does in this case, that it is legally "allow[ed] * * * to choose the messages and symbols that will appear on its [marquee], and that in all events the Board's decision to reject the [acting company's] proposal was not unconstitutional viewpoint discrimination." Pet. Br. 7.

Yet given this Court's viewpoint neutrality requirement—not only in designated and limited public fora, but also in nonpublic fora—such an exclusion could not be allowed. *See supra* note 4. Neither should it be allowed in the specialty license plate program involved in this case.

II. Texas's specialty license plate program lacks the properties this Court has identified as hallmarks of government speech

To be sure, when the government has viewpoints of its own that it wants to express, it may express those viewpoints instead of others. Indeed, the gov-

ernment could do so within a specialty license plate program, if the government genuinely dictates what is said on those plates. For instance, California's specialty plate program closely resembled Texas's current program until a federal district court enjoined the standardless application process as facially unconstitutional. *See Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145, 1154 (E.D. Cal. 2004). But California has since amended its program to promote only government agencies and government-linked organizations, such as the Coastal Commission, the Yosemite Conservancy, and the California Firefighters' Memorial.[5] The program's minimal options, limited to promoting state programs, show that California is engaging in government speech through its specialty plate program.

This is quite unlike the Texas program, which promotes a wide range of nongovernmental organizations. Indeed, the District Court found that, "by rule and practice," nonprofit groups provide the creative and expressive elements of the design. Pet. App. 57a. The Texas Department of Motor Vehicle Board's "input appears to be limited to (1) technical reformatting of a design to enable it meet visibility, distinctiveness, and reflectivity requirements, and (2) rejecting applications which otherwise do not conform to the various statutory and rule requirements for a specialty plate." *Id.*

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[5] California Dep't of Motor Vehicles, *California Special Interest License Plates*, https://www.dmv.ca.gov/portal/dmv/detail/online/elp/elp (last visited Feb. 1, 2015).

Texas asserts that it "'effectively control[s]' and exercises 'final approval authority' over the design," Pet. Br. 14 (internal citations omitted). But even when the government has final approval authority, a program to promote a diversity of private views may well qualify as a limited public forum. *Rosenberger*, for instance, found that the student publication funding program was a limited public forum, though the University exercised its final approval authority in denying funding to the plaintiffs' magazine, as well as to 17 other groups out of 135 applicants. *Rosenberger*, 515 U.S. at 825.

And in any event, Texas's final approval authority seems more nominal than real, given that Texas had never rejected a design application before this case. Likewise, though Texas claims to reserve the right to reject a design if it "*might* be offensive to *any* member of the public," Tex. Transp. Code § 504.801(c) (emphasis added), Texas has never exercised this right for any license plate other than the Sons of Confederate Veterans' plate. Presumably a plate supporting the Texas Trophy Hunters Association *might* offend *one* of 25 million Texans.[6] The same can be said about the plate that reads "One State Under God" (and bears the image of three crosses) or the plate that reads "Choose Life."[7] This

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[6] *See Anti-Hunting Activists Outraged by Texas Tech Cheerleader*, KCBD, July 1, 2014, http://www.kcbd.com/story/25919760/anti-hunting-activists-outraged-by-texas-tech-cheerleader.

[7] *See DMV Board Vote Diminishes Religious Liberty in Texas*, Texas Freedom Network, http://www.tfn.org/site/News2?page=NewsArticle&id=6677 (Dec. 8, 2011) (arguing that the

general lack of editing, even when a message is sure to offend someone, shows that the DMV views these plates as reflecting personal values, rather than conveying the government's message.

This lack of real selectivity on Texas's part is also one factor, among others, that explains how this case differs from *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460 (2009). As *Summum* rightly noted, "[p]ublic monuments displayed on public property typically represent government speech," and "[g]overnments have long used monuments to speak to the public." *Id.* at 470. Unsurprisingly, then, when it came to choosing what to permanently display on public land, Pleasant Grove exercised "selective receptivity," allowing only those monuments "that portray what [it views] as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Id.* at 471-72.

The monuments that were accepted, therefore, were "meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* And, "because property owners typically do not permit the construction of

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Texas plate featuring the words "One State Under God" and three crosses is "disrespectful" to people of all faiths); *Texas Senate Votes for Choose Life Plate*, Lubbock Avalanche-Journal, May 1, 2009 (reporting that abortion rights groups opposed Texas's proposed "Choose Life" plates); *Abortion Activists Upset Choose Life License Plates Fund Adoption Centers*, LifeNews, http://www.lifenews.com/2013/11/24/abortion-activists-upset-choose-life-license-plates-fund-adoption-centers (Nov. 24, 2013, 8:49 PM) (claiming that a "Choose Life" license plate "infuriates" abortion advocates).

such monuments on their land," "persons who *observe* donated monuments routinely—and reasonably—*interpret* them as conveying some message on the property owner's behalf." *Id.*

Monuments, moreover, have been used by governments to speak to the public "[s]ince ancient times." *Id.* at 470. Because they are permanent fixtures on government land, the government will necessarily select what monuments to display, based on its judgment about what best fits the government land on which they are displayed.[8]

Specialty license plates, on the other hand, are a recent development. They appear on a driver's privately owned car, with the driver choosing what message is to be displayed. In Texas, specialty license plates are approved with very little selection, and with little apparent judgment about what is most appropriate to display on Texans' cars or Texas highways. Thus, the plates cannot reasonably be classified as government speech.

Likewise, the programs in this Court's other leading government speech cases—*Johanns* v. *Live-*

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[8] This does not mean that a government that selects certain monuments necessarily adopts the monuments as its own private speech in all respects. *See Summum*, 555 U.S. at 476-77. The government as curator can select privately created speech on monuments, just as it does in art museums or on stamps, without thereby adopting the private speaker's viewpoint. *See, e.g., Protestants & Other Americans United for Separation of Church & State* v. *Watson*, 407 F.2d 1264 (D.C. Cir. 1968) (rejecting challenge to Postal Service decision to print stamp showing Madonna and Child painting displayed in the government-owned National Gallery).

stock Marketing Ass'n, 544 U.S. 550 (2005), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991)—are worlds apart from the Texas specialty license plate program. In *Johanns*, "the message set out in the beef promotions is from beginning to end the message established by the Federal Government." 544 U.S. at 560. This Court stressed that the Secretary of Agriculture was actively involved in crafting and approving "every word used in every promotional campaign," with every message "reviewed by Department officials both for substance and for wording, and some proposals [were] rejected or rewritten by the Department." *Id.* at 561.

Rust likewise involved a program through which the government was actively promoting its own coherent message. This Court concluded that, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833 (describing *Rust*'s holding); *Garcetti* v. *Ceballos*, 547 U.S. 410, 437 (2006) (likewise).

But here, as noted above, there is no "particular policy of its own" that Texas is promoting, *id.*, and no "message established by the [Texas] government," *Johanns*, 544 U.S. at 560. There is only a wide array of private speech, in a program set up to promote "a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834.

In this respect, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), is instructive. In *Hurley*, this Court recognized that, when an institution transmits the speech of others, it sometimes creates its own coherent speech product,

but sometimes just facilitates others' speech. (*Hurley* discussed this with regard to private institutions, such as parade organizers and cable networks, but the principle also applies to government institutions.)

In particular, this Court concluded that a parade was a parade organizer's own speech—even though it was composed of the speech of many participants—because, "[a]lthough each parade unit generally identifies itself, each is understood to contribute something to a common theme." *Id.* at 577. But the many channels distributed through a cable system are not viewed as the cable operator's coherent speech product. The cable system merely "consist[s] of individual, unrelated" channels "that happen to be transmitted together for individual selection by members of the audience." *Id.*

The specialty license plate program is unlike the parade organizers' coherent speech product, since the plates are not "understood to contribute something to a common theme." It is more like the cable system, "consist[ing] of individual, unrelated" license plates "that happen to be [distributed by the government] for individual selection by" Texas drivers. The license plate program is therefore not the government's own speech, just as the assembly of all the unrelated cable system channels was not the cable operator's own speech.

III. *Cornelius* v. *NAACP Legal Defense & Education Fund* and *Lehman* v. *City of Shaker Heights* show that viewpoint discrimination is barred even when the government itself physically prints program participants' speech

Nor can this case be properly distinguished from the viewpoint neutrality precedents on the grounds that the government prints and distributes the license plates. (See Pet. Br. 1, which argues that Texas should not be required to "etch[]" an "image onto state-issued license plates.") There is no constitutionally sound reason to distinguish such printing and distribution from furnishing meeting spaces for speech, *Widmar*, 454 U.S. at 268; subsidizing printing of speech, *Rosenberger*, 515 U.S. at 834; or physically hand-delivering speech as part of an interschool mail system, *Perry Educ. Ass'n*, 460 U.S. at 47-49. In all those cases the Court viewed the speech as private speech protected against viewpoint discrimination, rather than as government speech. The same conclusion should apply when the government is providing other valuable services, such as physically printing the license plates.

Indeed, this Court has required viewpoint neutrality even when government-printed messages were involved. This is clearest in *Cornelius*, which involved the Combined Federal Campaign, a program through which federal employees were encouraged to contribute to various charities.

The Office of Personnel Management printed and distributed to federal employees a pamphlet that contained 30-word fundraising statements from various charitable groups. The groups' speech thus ap-

peared in a document composed and printed by the federal government, and distributed on federal property by federal government employees. Yet this Court still concluded that the program had to be viewpoint-neutral. *Cornelius*, 473 U.S. at 806.

Likewise, this Court has held that a city that sells advertising space on city buses has to open up this space on a viewpoint-neutral basis. *R.A.V.*, 505 U.S. at 390 n.6 (describing *Lehman*, 418 U.S. at 303, which involved a city bus advertising program, as allowing "viewpoint-neutral" restrictions "in nonpublic forums"). As *Cornelius* noted, the *Lehman* plurality opinion "treated the advertising spaces on the [city-owned] buses as the [nonpublic] forum." *Cornelius*, 473 U.S. at 801. Any speech restriction in such a nonpublic forum must be viewpoint-neutral. *Id.* at 806, 811. And viewpoint neutrality was required even though the city had to physically display the ads on its buses, and even though the city or its contractors had to physically mount the advertising (and likely print it as well).

Texas's specialty plate program operates much like the print advertising venture in *Lehman*. Texas "sells" ad space to various private interests and generates significant revenue for Texas, estimated at about $170 million through fiscal year 2012.[9] Indeed, if anything, Texas's connection to the speech is even more attenuated than in *Lehman*, because the ads

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[9] Texas Dep't of Motor Vehicles, *Specialty License Plate Revenue Spreadsheet*, http://txdmv.gov/reports-and-data/doc_download/673-specialty-license-plate-revenue (last visited Feb. 11, 2015).

are displayed on private cars rather than city-owned buses.

Texas chose to raise money by making its specialty license program into a forum for private speech. If Texas wants to keep complete discretion over what slogans and symbols can go on Texas license plates, Texas is free to close this forum, and simply stop inviting the public to speak on license plates. But what Texas cannot do—without violating the First Amendment—is open up the forum, reap the financial benefits of creating such a forum, and then still claim a right to discriminate among messages based on viewpoint.

The government could not evade the constraints of viewpoint neutrality when it had to print the message in *Cornelius* or display, mount, and likely print the message in *Lehman*. Likewise, it may not evade the constraints of viewpoint neutrality simply because it has to physically print the design on the specialty license plates.

CONCLUSION

For these reasons, the Texas specialty license plate program (whether treated as a limited public forum or a nonpublic forum) may not discriminate based on viewpoint. The exclusion of the Sons of Confederate Veterans' design should be held to violate the Free Speech Clause. And the judgment of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET. AL.,
Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI*[1]

Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House of Representatives, are the leaders of the North Carolina General Assembly as well as the Petitioners in *Berger v. American Civil Liberties Union of North Carolina*, Case Number 14-35, which petition remains pending before this Court.[2] Because the Fourth Circuit held that North Carolina's legislatively enacted "Choose Life" specialty license plate was unconstitutional, *Amici*'s petition presents the following question: "Whether the government speech doctrine permits the State of North Carolina to promote its 'Choose Life' message through a specialty plate program over which it exercises complete and effective control without also offering a pro-choice specialty plate." As a result, President Pro Tem Berger and Speaker Moore have

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[1] The parties have submitted written consents to the filing of amicus briefs in this case. As required by Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than the *Amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] On January 14, 2015, Representative Tim Moore was selected as Speaker of the North Carolina House of Representatives, replacing Speaker Thom Tillis who was sworn in as a United States Senator on January 6, 2015. Pursuant to Rule 35.3 of the Rules of the Supreme Court of the United States, Speaker Moore is automatically substituted as a party to the petition that is pending before this Court: "When a public officer who is a party to a proceeding in this Court in an official capacity ... ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party."

a direct interest in the present case, which also implicates the government speech doctrine in the specialty license plate context. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) ("No one doubts that a State has a cognizable interest 'in the continued enforceability' of its laws that is harmed by a judicial decision declaring a state law unconstitutional.").

Moreover, *Amici* believe that North Carolina's experience in legislatively enacting specialty license plates and controlling their submission, review, editing, approval, and production will provide this Court with an important perspective on why the government speech doctrine should apply to legislatively controlled specialty plate programs regardless of how the Court applies the doctrine to an administratively controlled program like Texas's.

SUMMARY OF ARGUMENT

The central question in this case is whether specialty license plates are government speech. Under *Johanns v. Livestock Marketing Assoc.*, 544 U.S. 550 (2005) and *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the answer with respect to legislatively enacted specialty plates is unequivocally "yes."

The government speech doctrine protects a State's "right ... 'to say what it wishes,' and to select the views that it wants to express." *Id.* at 467-68 (citations omitted). As a result, in selecting its desired views, a State can exclude unwanted or inconsistent messages. *See id.* at 480 (explaining that the government can accept a donated war memorial while rejecting another "monument

questioning the cause for which the veterans fought"). Moreover, the government retains "this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468.

States that enact specialty license plates through legislation do all of these things—select specialty plate designs that convey a message that each State wants to promote (*e.g.*, "Choose Life"), reject designs that the State does not want to be associated with (*e.g.*, "Respect Choice"), and use third party volunteers to distribute their chosen message. Thus, legislatively enacted specialty plates are government speech.

Johanns and *Summum* confirm this result, finding government speech where the government "effectively controlled" the message and "exercis[ed] 'final approval authority'" over the selection, content, and design of the speech. *Id.* at 473 (quoting *Johanns*, 544 U.S. at 560-61). When legislatively approving specialty plates or monuments, the government "select[s] those [messages] that it wants to display for the purpose of presenting the image of the City [or State] that it wishes to project to all who frequent the Park [or see the specialty plates]." *Id.*

Moreover, the reasonable observer test—as well as the Fourth Circuit's multi-factor test from which it is derived—is an improper and unworkable standard for at least two reasons. First, the reasonable observer test is inconsistent with *Johanns* and *Summum*. In *Johanns*, this Court concluded that the "Beef, It's What's for Dinner" ads were government speech even though a reasonable

observer would not have identified the government as the speaker. *See Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 402 (2014) (Smith, J., dissenting) ("If a 'reasonable observer' test were the law, then [*Johanns*] was incorrectly decided."). In adopting *Johanns*, *Summum* expressly relied on the City's having complete and effective control over its monuments. Yet the reasonable observer test ignores this teaching and fails to distinguish between the different levels of control that States exercise over their specialty plate programs.

Second, the Circuits that have adopted a reasonable observer standard have done so based on a fundamental misunderstanding of *Wooley v. Maynard*, 430 U.S. 705 (1977). *See Vandergriff*, 759 F.3d at 395 (asserting that *Wooley* "presumed that the license plates were private speech"). Under *Wooley*, the Maynards could bring a compelled speech claim only because New Hampshire required them to be "a 'mobile billboard' for the *State's ideological message*." 430 U.S. at 715 (emphasis added). That is, the government speech and compelled speech inquiries were distinct. The Court determined that New Hampshire's legislatively enacted plate was government speech and then concluded that New Hampshire impermissibly forced the Maynards to carry the State's message.

Finally, *Summum* provides an independent basis for rejecting the forum analysis that several Circuits have applied to legislatively enacted specialty plates: the forum doctrine would "defeat[ ] the essential function of the ... [specialty plate] program." *Summum*, 555 U.S. at 478. Consistent with *Summum*'s discussion of monuments, States with

legislatively controlled specialty plate programs "select[ ] those [specialty plates] that [the State] wants to display for the purpose of presenting the image of the [State] that it wishes to project to all who" see its specialty plates. *Id.* at 473. Applying this Court's forum doctrine would force these States to authorize specialty plates that contradict their chosen messages, thereby undermining their right "to select the views that [they] want[ ] to express" and defeating the purpose of the program. *Id.* at 468. Thus, "forum analysis is out of place" in the context of legislatively enacted specialty plates. *Id.* at 480.

ARGUMENT

To date, lower courts have had difficulty discerning whether States are speaking government messages through their specialty plate programs. As a result of this uncertainty, these courts have promulgated conflicting tests for government speech (the control, reasonable observer, and multi-factor tests) and classified specialty plates in different ways (as government, private, and hybrid speech). In fact, even though this Court applied the government speech doctrine in *Johanns* and *Summum*, the Fifth Circuit alleged that this Court has never articulated a test for government speech. *Vandergriff*, 759 F.3d at 393. Thus, there is a pressing need for this Court to clarify the appropriate standard for government speech. This is particularly so in the specialty license plate context where the lower courts have addressed different kinds of specialty plate programs but have not clarified how the different levels of governmental

control affect the constitutional analysis under *Johanns* and *Summum*.

Consequently, in articulating a constitutional test for specialty plate systems, this Court should adopt a standard that accounts for the variety of specialty plate programs that States have created. As the Fifth and Ninth Circuits acknowledge, specialty plate programs may range from legislatively enacted systems (where a State legislature has complete control over the process) to an assortment of administrative programs (through which States cede differing levels of control to agencies, private organizations, or individuals). *See Vandergriff*, 759 F.3d at 396 (distinguishing *American Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370 (2006) because in *Bredesen* "the Tennessee legislature itself had passed an act specifically authorizing, creating, and issuing a 'Choose Life' specialty license plate"); *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 966 (2008) (stating that "[t]he Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech"). Texas's specialty plate program, which establishes three different ways to create and approve specialty license plates, illustrates this point well. *See* Tex. Transp. Code Ann. § 504.601-504.663 (legislative procedure), § 504.6011(a) (third party vendor), and § 504.801(a) (administrative procedure).

The effective control test set forth in *Johanns* and *Summum* provides the proper standard. Focusing on the government's control over the speech accounts for the different types of specialty plate programs, allowing States to retain control over their specialty

plate programs through a legislative process while protecting the First Amendment rights of individuals if the State relinquishes such control through an administrative procedure.

I. The Government Speech Doctrine Permits States to Determine the Content of Legislatively Enacted Specialty Plates.

The hallmarks of government speech under *Johanns* and *Summum* are the government's effective control over the speech and its exercise of final approval authority over the content and design of the message. Thus, where government officials have complete authority over the content, design, and approval of specialty license plates, the State is speaking, and the First Amendment viewpoint non-discrimination principle is inapplicable. And, as *Johanns*, *Summum*, and *Rust* instruct, the fact that third parties volunteer to distribute that message—and are willing to pay more for the privilege of doing so—does not convert government speech into private speech.

A. Legislatively Controlled Specialty Plates Are Government Speech under *Johanns* and *Summum* Because the Government Retains Effective and Complete Control over Their Content and Design.

Any analysis of the government speech doctrine must begin with this Court's two most recent government speech decisions—*Johanns* and *Summum*. A careful review of these cases shows that, contrary to the Fourth and Fifth Circuits' contentions, this Court has taken the government's

effective control over the message to be the touchstone for government speech.

Although some Circuits have tried to limit *Johanns* to the controlled subsidy context to avoid applying its effective control test, *see, e.g.*, *American Civil Liberties Union of North Carolina v. Tata*, 742 F.3d 563, 570 (2014), these efforts are unavailing because *Johanns* necessarily implicates government speech. The beef producers could assert a compelled subsidy claim only if they were "compelled ... to subsidize a private message with which they disagree." *Johanns*, 544 U.S. at 557. Thus, the threshold question was whether the "Beef, It's What's for Dinner" campaign was government or private speech.

In answering this question, *Johanns* focused exclusively on the government's control over the message. The advertisements were government speech because (i) "[t]he message of the promotional campaigns is *effectively controlled* by the Federal Government itself," (ii) "[t]he message set out in the beef promotions is from beginning to end the message *established by the Federal Government*," (iii) the government "*exercises final approval authority* over every word used in every promotional campaign," and (iv) the government "retains absolute *veto power* over the advertisements' content, right down to the wording." *Id.* at 560-63 (emphasis added). Given this level of control, the Court concluded that "[n]o more is required" and held that the ads were government speech. *Id.* at 564.

The majority also made clear that the government speech inquiry could be determined

without reference to the reasonable observer, which is why the respondents' compelled subsidy claim failed: "As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and *whether or not the reasonable viewer would identify the speech as the government's.*" *Id.* at 564 n.7 (emphasis added). In his dissent, Justice Souter lamented that the majority had rejected his position—that the government speech doctrine should apply only if a third party would understand the government to be the speaker—in favor of this "control" test, which finds government speech where "Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads." *Johanns*, 544 U.S. at 578 (Souter, J., dissenting).

When deciding whether the monuments in *Summum* were government speech, this Court followed *Johanns* and analyzed the level of authority that the government exercised over the monuments. As part of its explication of the general principles of the government speech doctrine in section II.A., this Court explained that "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a *government-controlled* message" and cited *Johanns* for the proposition that "where the government *controls the message*, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources.'" *Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 562) (emphasis added).

Applying this test in the monument context, the Court held "it is clear that the monuments ... represent government speech." *Id.* at 472. Drawing directly on *Johanns*, the Court concluded that the monuments were government speech because "the City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." *Id.* at 472-73 (quoting *Johanns*, 544 U.S. at 560-61). The "reasonable observer" played no role in this determination; the Court predicated government speech on the level of authority that government officials had over the speech, not on how third parties interpreted that speech.

Under a direct application of *Summum*, then, legislatively enacted specialty plates also are government speech. As with government commissioned monuments, no one disputes the "obvious proposition" that standard issue license plates are government speech. *Summum*, 555 U.S. at 470. A State selects the wording, design, and color scheme of its standard issue plate to convey something about the State. *See id.* (recognizing that a government entity commissions a monument "because it wishes to convey some thought or instill some feeling in those who see the structure").

The same is true for legislatively enacted specialty plates because, as the Fourth Circuit acknowledges, States with legislatively controlled specialty plate programs retain "complete editorial control" over the design and content of their specialty plates. *Tata*, 742 F.3d at 573. And they do so in the same way as government officials who decide whether to accept donated monuments—"through prior submission requirements, design

input, requested modifications, written criteria, and legislative approvals of specific content proposals." *Summum*, 555 U.S. at 472. Furthermore, legislatively approved specialty plates, like privately donated monuments, "portray what [government officials] view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture." *Id.* Through specific legislation, a State selects only those specialty plates that it wants to display "for the purpose of presenting the image of the [State] that it wishes to project" to all who see its license plates. *Id.* at 473. Although third parties are free to propose certain specialty plates, they cannot impose their message on a State or force the state legislature to "adopt" or "embrace" the third parties' desired message. *Id.* at 473-74.

In this way, a State like North Carolina uses its specialty plates to promote unique or important aspects of the State and its citizens,[3] highlighting,

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[3] In *Vandergriff*, the Fifth Circuit majority asserted that "while public parks have traditionally been 'closely identified in the public mind with the government' and have 'play[ed] an important role in defining the identity [of] a city,' the same cannot be said for license plates and the backs of cars." 759 F.3d at 395. As anyone who has played the license plate game knows, this assertion is false. License plates—whether standard issue or specialty plates—promote certain features or images of States, including Florida's oranges, Colorado's mountains, Utah's red-rock arch, Idaho's potatoes, and New Hampshire's "Live Free or Die." *See, e.g.*, Karen Aho, "America's Favorite License Plate? Wyoming" (available at http://www.carinsurance.com/Articles/favorite-license-plates.aspx) (noting that "[l]icense plates entice travelers to visit the state.... In the CarInsurance.com

among other things, its concern with education (*e.g.*, collegiate plates, Kids First), civic groups (*e.g.*, Kiwanis, Knights of Columbus, Oasis Temple, and Lion's Club), sports (*e.g.*, Carolina Panthers, Carolina Hurricanes, and various NASCAR plates), conservation (*e.g.*, Save the Sea Turtles, North Carolina Coastal Federation, North Carolina State Parks, and North Carolina Trout Unlimited), and recreational opportunities (*e.g.*, golf, tennis, ocean, and mountains).[4] Accordingly, the specialty plates "that are accepted ... are meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id.* at 472.

B. States Do Not Lose the Protection of the Government Speech Doctrine When Third Parties Voluntarily Display Legislatively Enacted Specialty Plates on Their Vehicles.

Once a state legislature approves a specialty plate, motorists are free to select and to display that message on their vehicles. To be sure, a State enlists these volunteers to disseminate its chosen

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survey, 13 percent of respondents said a plate had inspired a vacation or relocation....") (last visited on January 15, 2015).

[4] Given the variety of people, landmarks, and historical events associated with each State, it is not surprising that some States have authorized an array of specialty plates. *See Bredesen*, 441 F.3d at 376 (recognizing that "there is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups, ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life.").

message. But as this Court has stated repeatedly, relying on others to propound the government's message does not cause the government to forfeit the protection of the government speech doctrine: "A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Id.* at 468; *Johanns*, 544 U.S. at 562 ("When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages."); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (stating that a government entity may "regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message.").

If this Court were to hold otherwise, then, as the Sixth Circuit noted in *Bredesen*, third parties could force the government to proffer messages contradicting its chosen message in a variety of contexts. Having distributed pins saying "Register and Vote" or stamps saying "Win the War" during World War II, the government could be required to give out "Don't Vote" pins or "Stop the War" stamps. *See Bredesen*, 441 F.3d at 379; *accord Rust v. Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, ... , it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and

fascism.").[5] The government speech doctrine precludes such a result.

Moreover, the government retains the protection of the government speech doctrine even if a private person, who assists in creating or disseminating the government's chosen message, also seeks to engage in expressive activity. *See Summum*, 555 U.S. at 476 ("the thoughts or sentiments expressed by a government entity that accepts and displays [a monument] may be quite different from those of either its creator or its donor."). Given that monuments may convey multiple messages, those who observe a monument may interpret it in myriad ways and may even attribute a message to a third party (*e.g.*, the creator or donor) without causing the government to lose the protection of the government speech doctrine. *Id.* at 474 ("Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."). Provided that government officials exercise

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[5] Legislatively enacted specialty plate programs do not preclude motorists with opposing views from communicating their opposition through other traditional means of expression—bumper stickers, window decals, license plate frames, or paint schemes. *See Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct 2321, 2330 (2013) (explaining that "[b]ecause the regulations [n *Rust*] did not 'prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,' they did not run afoul of the First Amendment.") (quoting *Rust*, 500 U.S. at 197); *Rust*, 500 U.S. at 198-99 ("The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals.").

"effective control" over the monument selection, the speech remains government speech.

The same is true for legislatively enacted specialty plates. A vehicle owner may like a particular specialty plate and choose to put it on her vehicle for any number of reasons—because she (i) wants to help the State spread its message, (ii) wants to financially support a group that receives some of the revenues from that plate, (iii) likes the color and design, (iv) thinks others will be impressed that she has such a plate, or (v) some other reason. Under *Summum*, both the State and the driver are free to engage in expressive activity through the specialty plate (just as the Fraternal Order of Eagles could express a message about juvenile delinquency even though the government adopted the Ten Commandments monument for its own purposes).[6] Yet, as in the monument context, the speech remains government speech because the government has effective control over the content and design of the plate.

Furthermore, the fact that vehicle owners are willing to pay more for the privilege of carrying the government's message does not morph government speech into private speech. As *Summum* explains, there are good reasons why the government relies on private funding before engaging in certain speech activity: "By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own." *Summum*, 555 U.S. at 471. States require that a

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[6] *See Van Orden v. Perry*, 545 U.S. 677, 682-83 (2005).

certain number of drivers sign up for a specialty plate before beginning production for the same reasons: to ensure that the cost of production is covered and to promote various aspects of the State that it might not otherwise have been willing to fund (through the specific messages on their specialty plates as well as through the moneys that are distributed to groups working on causes related to those plates).[7] Regardless of the varying reasons drivers may have for volunteering to carry the State's message, the legislature enacts the specialty plate for its own expressive purposes. *See id.* at 476-77 ("Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument."). These legislatively enacted specialty plates, therefore, are government speech.

Rust confirms this conclusion. Under *Rust*, a State could pay willing citizens to display specific specialty plates, such as "Choose Life," on their vehicles: "the government may 'make a value judgment favoring childbirth over abortion, and ... implement that judgment by the allocation of public funds.'" 500 U.S. at 192-93 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). But if the government can

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[7] *See, e.g.*, N.C.G.S. § 20-79.7(a)(1) (specifying that $15.00 from every "Choose Life" plate would go to the Carolina Pregnancy Care Fellowship, a private organization that funds and supports crisis pregnancy centers in North Carolina).

establish the same program without expending public funds, there is no basis for suddenly treating the speech as private. *See Bredesen*, 441 F.3d at 378 ("There is nothing in the Supreme Court's decisions in *Rust* or *Johanns* that implies that the government has less right to control expressions of its policies when it relies on unpaid private people. No constitutionally significant distinction exists between volunteer disseminators and paid disseminators."). That the State may have to wait until enough motorists agree to cover the costs of producing a new specialty plate is no different from the government's approving the design of a memorial but waiting to begin construction until enough donations are received to cover the cost of the monument. Once funded and produced, the resulting speech—whether a monument or a legislatively enacted specialty plate—is government speech.

C. *Summum*'s Control Test Does Not Give Government Officials Unfettered Authority to Control Public Debate.

Requiring that the government retains effective control over its speech ensures that (i) the government actually is speaking and (ii) is able to carry out its functions without being subject to a heckler's veto. *See Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view"); *Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the

'marketplace of ideas' would be out of the question."). But the "effective control" test does not give government officials unlimited authority to control public debate. As the Court notes in *Summum*, government speech is limited in several ways: (i) the Establishment Clause, (ii) laws, regulations, or practices that restrict public officials' involvement in advocacy, and (iii) the fact that government officials are "ultimately 'accountable to the electorate and the political process for its advocacy.'" *Summum*, 555 U.S. at 468 (quoting *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000)).

The control test also recognizes that the government may create a forum for private expression subject to the constraints of the First Amendment when it cedes some or all of its control over the content of the speech. The Court makes this point expressly in *Summum* in relation to the government's control over monuments:

> To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument—for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message.

Id. at 480. But the Court nowhere suggests that relinquishing control over the content of this monument would cause the government to forfeit its right to speak through other monuments over which it retained effective control.

The same holds true for specialty license plates. In North Carolina, for example, the legislature must

pass and the governor must sign a statute specifically authorizing all new specialty license plates. *See* N.C.G.S. § 20-79.3A. The only exceptions are for national civic organizations and colleges and universities. *See* N.C.G.S. § 20-79.4(b)(42) (allowing specialty plates for "a nationally recognized civic organization whose member clubs in the State are exempt from State corporate income tax" and are operated exclusively for the promotion of the general welfare) and § 20-81.12 (allowing specialty plates bearing college insignia once 300 applications are received). With respect to these two types of specialty plates, the North Carolina legislature allows civic groups and colleges to place their logos or insignia on its specialty plates without going through the normal legislative process, just like the hypothetical city in *Summum* allowed residents to honor a person or to place a private message on one of its monuments. As a result, North Carolina cannot discriminate based on the viewpoint of the civic organizations or colleges that meet the general statutory requirements. But North Carolina retains complete control over all other specialty plates and, therefore, can select only those plates that express views with which it wants to be associated.

II. The Reasonable Observer Test Not Only Is Inconsistent with *Johanns* and *Summum*, but also Is Predicated on a Fundamental Misunderstanding of *Wooley*.

The majority of lower courts that have considered specialty license plates have adopted a reasonable observer test, which is derived from the Fourth Circuit's multi-factor test. *See Choose Life of Ill., Inc. v.*

White, 547 F.3d 853, 863 (7th Cir. 2008) (concluding that the Fourth Circuit's test "can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party."). Consistent with Justice Souter's concurrence in *Summum*, this test asks "'whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige.'" *Vandergriff*, 759 F.3d at 394 (quoting *Summum*, 555 U.S. at 487 (Souter, J., concurring)).

The reasonable observer test is an untenable standard for determining whether the government is speaking for at least two reasons (beyond the fact that it garnered only one vote in *Summum*). First, predicating government speech on a reasonable observer contradicts *Johanns* and *Summum*. If a reasonable observer's identifying the government as the speaker is all that is required, then *Johanns* should have come out differently, and *Summum* should have expounded on the reasonable viewer standard instead of simply mentioning the concept quickly at the end of one paragraph in Section III to highlight why *Summum* was not a difficult case. The Court did neither of these things.

Second, the courts that have applied the reasonable observer test to specialty plates do so based on a misinterpretation of *Wooley*. Although a reasonable observer might have attributed "Live Free or Die" to the Maynards, which was necessary for their compelled speech claim, the reasonable observer played no role in the Court's determination

that the motto was the "*State's* ideological message." 430 U.S. at 715.

A. The Reasonable Observer Test Contradicts This Court's Reasoning in *Johanns* and *Summum*.

In *Johanns*, this Court held that the "Beef, It's What's for Dinner" ads were government speech even though a reasonable observer would not identify the government as the speaker. In fact, *Johanns* rejected respondents' claim that "[c]ommunications cannot be 'government speech,' ... if they are attributed to someone other than the government." *Johanns*, 544 U.S. at 564-65; *Id.* at 577 (Souter, J., dissenting) (disagreeing with the majority's conclusion—that the ads were government speech—because "the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads."). As the Court explained, the "correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights." *Id.* at 564 n.7. Given that the government "effectively controlled" the advertising messages and exercised "final approval authority" over their content, the ads were government speech. The respondents, therefore, could not bring a compelled subsidy claim "whether or not the reasonable viewer would identify the speech as the government's." *Id.* Thus, the reasonable observer test is directly at odds with *Johanns*.

Given that *Summum* applies *Johanns*, it is not surprising that *Summum* also does not support a reasonable observer test.[8] Although *Summum* made passing reference to the fact that "persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on their behalf," it did not adopt a reasonable person standard. *Id.* at 471. Instead, as discussed above, the Court repeatedly emphasized the government's control over the message. The reasonable observer test, therefore, is inconsistent with *Summum* because that test focuses exclusively on how a viewer interprets the message, rendering the level of control irrelevant to the government speech analysis. *See Johanns*, 544 U.S. at 578 (Souter, J., dissenting) ("It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them.").

The Fourth and Fifth Circuit decisions demonstrate that control plays no significant role under the reasonable observer and multi-factor tests. In *Vandergriff*, the majority held that Texas's administrative procedure fostered private speech. But the majority noted that it would have reached the same result even if Texas, like Tennessee in *Bredesen*, had complete control over the specialty plate program. *Vandergriff*, 759 F.3d at 396 (distinguishing *Bredesen* based on the level of control

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[8] In *Summum*, Justice Souter sought to resurrect his reasonable observer test, but no other Justice joined his concurring opinion. *Summum*, 555 U.S. at 487 (Souter, J., concurring).

but stating that "we would decline to follow *Bredesen*" regardless of that distinction). Similarly, the Fourth Circuit concluded that North Carolina's specialty plates were private speech even though it had complete editorial control. *See Tata*, 742 F.3d at 573. Accordingly, because *Vandergriff* and *Tata* always associate specialty plates with the vehicle owners, the entity or person controlling the messages on those plates—whether a legislature, agency, or private person—does not matter to the government speech analysis (which is why these Circuits contend that *Bredesen* was decided wrongly).

Under *Summum*, however, the distinction between complete and partial control is critical. Just as there is a constitutionally significant difference between monuments that the government controls and those that are opened to the public to "place the name of a person to be honored or some other private message," there is a constitutionally significant difference between administratively controlled and legislatively controlled specialty plate programs. *Summum*, 555 U.S. at 480. *Compare Stanton*, 515 F.3d at 966 (holding that Arizona's administrative procedure for specialty license plates created a limited forum given "[t]he Commission's de minimis editorial control over the plate design and color") *with Bredesen*, 441 F.3d at 376 (concluding that Tennessee's "Choose Life" specialty plate was government speech because the State "approved every word to be disseminated," "set the overall message and the specific message," and "retains a veto over its design".). Any standard that ignores *Johanns*'s and *Summum*'s extended discussions of

government control, therefore, is inconsistent with those decisions.

Consequently, because the reasonable observer standard contradicts *Johanns* and renders the level of governmental control over the speech irrelevant, this Court should reject that standard.

B. Because *Wooley* Interpreted New Hampshire's License Plate as Government Speech, It Provides No Support for the Reasonable Observer Test.

The lower courts that rely on a reasonable observer or multi-factor test display a fundamental misunderstanding of *Wooley* and the government speech doctrine. These courts contend that *Wooley* is incompatible with any type of control test for government speech. As the Fourth Circuit puts it, if *Johanns* establishes that "control of the message is all that matters, both *Wooley* and *Barnette* would have been wrongly decided." *Tata*, 742 F.3d at 570; *Vandergriff*, 759 F.3d at 395 (stating that *Wooley* "presumed that the license plates were private speech.").

While recognizing that *Wooley* is a compelled speech case, these Circuits disregard the fact that the constitutional violation arose only because the State sought to force the Maynards to "use their private property as a 'mobile billboard' for the *State's ideological message*." *Wooley*, 430 U.S. at 715 (emphasis added). That a reasonable observer might attribute the message to the Maynards enabled them to bring a compelled speech claim, but that fact had no bearing on whether "Live Free or Die" was New

Hampshire's message. The Court determined that New Hampshire's standard issue license plate was government speech, which made good sense given that New Hampshire controlled the entire license plate process (from owning the license plate to selecting the message). The First Amendment violation, though, resulted from New Hampshire forcing its citizens to carry *its* message.

Of course, specialty plates do not even implicate the central issue in *Wooley*—compelled speech. States authorizing specialty plates do not require anyone to display a specialty plate. Instead of being forced to be "the courier for such [governmental] message," motorists consent to carrying that message. *Wooley*, 430 U.S. at 717; *Summum*, 555 U.S. at 468. Thus, because *Wooley* addresses a separate constitutional issue, confirming that the government's level of control is critical to the government speech inquiry does not overturn *Wooley* or *Barnette*.

III. This Court's Forum Doctrine and Its Corollary Viewpoint Non-discrimination Principle Are Inapplicable to a Program in Which the Government Speaks Its Own Message.

Summum provides an alternative basis for rejecting the application of this Court's forum doctrine to legislatively enacted specialty plates: "'[P]ublic forum principles... are out of place in the context of this case.'" *Summum*, 555 U.S. at 478 (quoting *United States v. American Library Assn.*, 539 U.S. 194, 205 (2003)). In *Summum*, the Court noted that the park could "accommodate only a

limited number of permanent monuments" given its size. *Id.* at 480. But the Court refused to apply the forum doctrine because doing so would undermine the City's policy of selecting only those monuments that conveyed a message that the City supported: "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of private speakers without defeating the essential function of the land or program." *Id.* at 479. If private speech interferes with the "essential function" of the government's land or program, then the Court eschews its forum doctrine.

By refusing to apply its forum doctrine in such situations, the Court protects the government's ability to avoid sending messages that conflict with its chosen message. Thus, the City could not be required to accept the Summum monument—or any other monument—if the City determined that the monument interfered with its intended message. Otherwise, "[e]very jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought." *Id.* at 480.

The same analysis applies to legislatively enacted specialty plates. To see why, consider the specialty plate analogue to a donated war memorial. If a State legislature approves a "Support Our Troops" or "Veterans of Foreign Wars" specialty plate and this Court's forum doctrine applied, then the State legislature would have to issue specialty plates disparaging our troops and questioning the causes for which our veterans fought. That is, the State

would be forced to approve conflicting messages—even though it retains complete control over its specialty plate program—thereby undermining its right "to select the view that it wants to express." *Id.* at 468.

Of course, what is true with respect to military specialty plates would also be true for other specialty plates. To avoid impermissible viewpoint discrimination, State legislatures must either allow opposing viewpoints on any existing specialty plate—which would lead to a proliferation of plates advancing positions with which the States disagree—or do away with those plates, precluding its ability to "say what it wishes." *Rosenberger*, 515 U.S. at 833; *Summum*, 555 U.S. at 480 ("If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either 'brace themselves for an influx of clutter' or face the pressure to remove longstanding and cherished monuments.").

For example, having issued a "Save the Sea Turtles" plate, which expresses a State's concern for and pride in its coastal wildlife, the legislature may be required to issue a plate expressing an alternative viewpoint, such as "Kill the Sea Turtles" or "Let the Sea Turtles Die." Under this Court's forum doctrine, when confronted with such an alternative, the State would have to accept the proposed plate (thereby promoting a message directly at odds with its chosen view) or do away with the "Save the Sea Turtles" plate. But this directly contravenes *Summum*. *See Id.* at 480 (denying that a city that adopted a war memorial would have to "provide equal treatment for a donated monument questioning the cause for which the veterans fought.").

Contrary to the suggestion of some Circuits, this concern is not idle speculation. For example, the Fourth Circuit, like the "respondent and some of its *amici*" in *Summum*, "deride[s] the fears expressed about the consequences of the Court of Appeals holding in this case." *Summum*, 555 U.S. at 479; *Tata*, 742 F.3d at 575 ("North Carolina then sounds the death knell for specialty plates, predicting a 'flood' of 'Kill the Sea Turtles' and 'Children Last' plates that will force it to end its specialty plate program."). But, as this Court explained in *Summum*, "those concerns are well founded." *Summum*, 555 U.S. at 479. In fact, this Court illustrated the problem that State legislatures would face if the forum doctrine applied to legislatively enacted specialty plates:

> On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

Id. But *Summum* refused to impose any such requirement on government officials, upholding their right to reject private speech that conflicts with the message they seek to send through their government-controlled property and programs.

Because applying this Court's forum doctrine to monuments or specialty plates would defeat "the essential function of the land or program," this Court's "forum analysis is out of place" in this case.

Legislatively enacted specialty plates, like government-controlled monuments, therefore, are government speech. *Id.* at 478, 480.

CONCLUSION

As this Court explained in *Summum*, "it is not easy to imagine how government could function if it lacked th[e] freedom ... 'to say what it wishes' and to select the views that it wants to express." *Id.* at 467-68 (citations omitted). Because the reasonable observer and multi-factor tests preclude a State from doing just that—even though it retains complete control over its specialty plate program—this Court should affirm the "effective control" test in *Johanns* and *Summum*.

Respectfully submitted,

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JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS INC., ET AL.,

Respondents.

On a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, P.J. O'ROURKE, NAT HENTOFF, MARTIN GARBUS, NADINE STROSSEN, AND THE COMIC BOOK LEGAL DEFENSE FUND, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Can the government censor speech based on the belief that someone "might be" offended?

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations and individuals who are deeply implicated in the fight to protect the freedom of speech in all its guises.

The Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. Cato is committed to preserving the freedom of expression and making people uncomfortable about their policy positions.

P.J. O'Rourke is one of America's leading political satirists, an H.L. Mencken Research Fellow at the Cato Institute, and an equal-opportunity offender. Formerly the editor of the *National Lampoon*, he has written for such offensive publications as *Car and Driver*, *Playboy*, *Esquire*, *Vanity Fair*, *House & Garden*, *The New Republic*, *The New York Times Book Review*, *Parade*, *Harper's*, and *Rolling Stone*. He is now a contributing editor at *The Atlantic* and *The Weekly Standard*—which tend to offend each others' readers—and a member of the editorial board of *World Affairs*. O'Rourke's books have been

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[1] Pursuant to this Court's Rule 37.3(a), both parties have consented to the filing this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution to its preparation or submission.

translated into a dozen languages and are worldwide bestsellers. Three have been *New York Times* bestsellers: *Parliament of Whores*, *Give War a Chance*, and *All the Trouble in the World*. He is also the author of *Eat the Rich*, *Peace Kills*, and *Don't Vote: It Just Encourages the Bastards*.

Nat Hentoff is one of the foremost authorities on and practitioners of the First Amendment. While his books and articles regularly defend the rights of Americans to think and speak freely, he also protects our freedoms by showing how Supreme Court and local legislative decisions affect the lives of ordinary Americans. Hentoff's column, "Sweet Land of Liberty," has been distributed by the United Feature Syndicate since 1992. In 1995, he received the National Press Foundation Award for Distinguished Contributions to Journalism and, in 1999, he was a Pulitzer finalist for commentary. Hentoff was a columnist and staff writer with *The Village Voice* for 51 years, and also writes on music for *Wall Street Journal* and *Jazz Times*. He serves on the board of advisors of the Foundation for Individual Rights in Education (FIRE) and is on the steering committee of the Reporters' Committee for the Freedom of the Press. He was awarded an honorary doctorate of law from Northeastern University in 1985.

Martin Garbus, one of America's leading First Amendment lawyers, represented Lenny Bruce as well as other clients with offensive speech issues, including before the U.S. Supreme Court. He is the author of five books on constitutional law and free speech, including *Courting Disaster*, *Tough Talk: How I Fought For Writers, Comics, Bigots, and the American Way* and *The Next 25 Years: How The*

Supreme Court Will Make You Forget the Meaning of Words Like Privacy, Equality and Freedom. Garbus is the recipient of numerous awards, including a Fulbright Award, a PEN USA First Amendment Award of Honor, and the James Joyce Award from the Literary and Historical Society, University College Dublin.

Nadine Strossen holds the John Marshall Harlan II Chair at New York Law School, was president of the American Civil Liberties Union from 1991 through 2008, and continues to serve on the ACLU's National Advisory Council. She also holds leadership positions in other organizations that focus on free speech issues, including FIRE. Strossen's extensive writings that defend freedom for offensive expression include her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Scribner 1995) and her co-authored book, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (NYU Press 1994). Her ideas on this and other topics have many times been deemed sufficiently offensive to trigger boycotts, dis-invitations, and picketing, as well as death threats. To cite one memorable example, on April 12, 2005, while attempting to speak at an event honoring Justice Antonin Scalia, she was shouted down by protestors who were offended by some of his opinions and her participation in the event.[2] Ironically, some of these protesters engaged in offensive expression themselves, without Justice Scalia or anyone else trying to suppress it. Strossen is proud to occupy a

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[2] *See, e.g.*, Petrox, *Scalia at NYU Law: When Libs and Free Speech Implode*, DailyKos, Apr. 12, 2005, http://goo.gl/ouGLsZ.

chair named after the justice who authored *Cohen v. California*, which upheld the right to engage in offensive expression, recognizing that this is "powerful medicine in a society as diverse...as ours" but explaining that "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

The Comic Book Legal Defense Fund is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians and readers. With a membership that includes comic book creators, publishers, retailers, and aficionados, the CBLDF has defended dozens of First Amendment cases in courts across the United States, and led important education initiatives promoting comics literacy and free expression.

This case concerns *amici* because someone is offended by nearly everything they do in their personal and professional lives. They would hate to have any government judge their propriety.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Between 1861 and 1865, Texas was in a state of rebellion, waging war against the United States under the flag of the Confederacy. Texas has never offered any indication that it is ashamed of this history. Indeed, the state recognizes April as Confederate History Month, and spends January 19 celebrating Confederate Heroes Day. Monuments commemorating the ~~Civil War~~ War of Northern Aggression can be found deep in the heart of the Lone Star State.

Yet to coddle the sensitivities of its citizens, Texas would spare them in one context the sight of the very flag it otherwise venerates (among other "offensive" sights): it has empowered the state Department of Motor Vehicles to prevent people from being offended by license plates. (Not *all* people, mind you; that would be too high a bar, even if the DMV knows better than anyone exactly what it takes to be universally offensive.) When the DMV determined that *some* people would be offended by a specialty plate that features the Confederate battle flag—hard to dispute that claim—that was all that was required under the relevant statute to ban such expression. To wit, the Board can "refuse to create a new specialty license plate if the design *might be offensive to any member of the public*." Tex. Transp. Code Ann. § 504.801(c) (emphasis added).

If this were simply another instance of governmental hypocrisy, we would not be here. There's no constitutional provision forbidding hypocrisy, which Americans have come to expect from government officials. But Texas's actions were

more than merely hypocritical. They violated the basic constitutional principle—one that Texas had to reaffirm when it was readmitted to the Union—that a state cannot protect the sensibilities of some by restricting others' freedom to speak.

Moreover, the DMV seems to pursue its mission—the righteous task of ensuring that not even one motorist has to endure half a second of micro-aggression before he reaches down to change the radio—in a half-hearted way. After all, take a look at the plate designs it has let slip by its censorious filter. Texas DMV, *Specialty License Plates*, http://txdmv.gov/motorists/license-plates/specialty-license-plates (last visited Feb. 16, 2015).

The "Boy Scouts" specialty plate no doubt ruffles the feathers of those who consider that group to be a retrograde anti-gay menace (and also those who cannot abide children in uniforms). The "Choose Life" plate similarly raises the hackles of those who think that its message subtly slanders women who might choose to have an abortion. What about "Come and Take It" (accompanied by a picture of a cannon) or "Desert Storm" or "Fight Terrorism"? Forget viewpoint discrimination; these sorts of messages would insult pacifists and those who disagree with American foreign policy even if "Turn the Other Cheek" or "Al Qaeda Forever" tags were available. "Mighty Fine Burger" and "Dr. Pepper" surely offend Michael Bloomberg's acolytes, not to mention fans of McDonalds and Pepsi. Many Apache, Comanche, or Kiowa would take offense at a good ol' boy driving around with a "Native Texan" plate. And would not an animal-rights supporter who volunteers for PETA have a (soy) beef with the "Texas Trophy Hunters

Association" plate. Finally, any true Texan would find the "University of Oklahoma" plate to be beyond the pale of *any* standard of human decency.[3]

Such is the problem with trying to eradicate offensive speech: everything offends someone. Texas's attempt to solve this problem is quixotic at best and unconstitutional at worst. Yet Texas's law is not just unconstitutional, it is unwise. In a free society, offensive speech should not just be tolerated, its regular presence should be celebrated as a symbol of democratic health—however odorous the products of a democracy may be.

In the past, *amicus* P.J. O'Rourke has been particularly offensive to this brief's counsel of record, who is Canadian. In an early issue of *National Lampoon*, O'Rourke wrote an extremely insensitive article, *Foreigners of the World: A Brief Survey of the Various Foreign Types, Their Chief Characteristics, Customs, and Manners*, Nat'l Lampoon, May 1976, at 59. O'Rourke described Canucks thus, in what was (fittingly) the mildest part of the piece:

> Hard to tell a Canadian from an extremely boring regular white person unless he's dressed to go outdoors. Very little is known of the Canadian country since it is rarely visited by anyone but the Queen and illiterate sport fishermen. It is thought to resemble a sort of

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[3] One research fellow at *amicus* Cato is a die-hard Sooners fan. While he appreciates the OU tag, he is offended by the very existence of Texas and respectfully suggests that, as an alternative way to dispose of this case, this Court could rule that Texas is unconstitutional. Or, better yet, make it part of Oklahoma. That would really help with recruiting.

> arctic Nebraska. It's reported that Canadians keep pet French people. If true, this is their only interesting trait. At any rate, they are apparently able to train Frenchmen to play hockey, which is more than any European has ever been able to do.

Id.[4] Of course, there's only so much you can say about the most innocuous country on earth, so O'Rourke also went after Africans, Arabs, Chinese, Indians, Mexicans, and others in the most innovatively stereotypical way possible.[5]

Not bad, we guess, for someone from Ohio, a state that not only doesn't reach Michigan's level of cultural significance, but has a stunningly high ratio of people (12 million) to places of interest (11—or 12 if you count Cincinnati's American Sign Museum, which we don't). Ohio is so backward that it even tried to criminalize making "false statements" about political candidates. We're happy that this Court found that offensive (or at least that others had

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[4] Counsel Shapiro notes that to the extent this uncouth satire carries any grain of truth, he has tried to improve himself by also becoming American. After navigating the offense to reason that is the immigration system, Shapiro became a U.S. citizen last year. Like most immigrants, he does a job most Americans shy away from: defending the Constitution.

[5] *Amici* could very easily include here some offensive lines aimed at the Court, targeting justices' ethnicities, geographical origins, and gender, let alone their jurisprudence. We refrain from doing so not because we lack the right to do so—or even because it wouldn't further illustrate the thrust of our argument—but because part of what makes "offensive" speech valuable is the ability to employ (or not employ) it strategically.

standing to plead constitutional offense). *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

In any event, offensive speech is unquestionably protected by the First Amendment. *See, e.g., Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Yet too often offensive speech seems to be protected begrudgingly, perhaps because it is difficult to draw a line between offensive and inoffensive speech—implying that if such a line could be drawn, *then* banning offensive speech might be desirable. Or its protection comes with an apology, a reluctance to fully commit First Amendment protections to the most boorish and crass among us.

Well, the boorish and crass are now before this Court to ask that their contributions be recognized. Offensive speech should not just be considered incidentally protected, but inherently valuable to a free society. Fifty-four years after Lenny Bruce—the comedian perhaps best known for pushing the envelope of propriety—was arrested onstage at the Jazz Workshop in San Francisco, offensive speech still needs protection. And a case concerning a specialty license plate that is admittedly odious to some is the perfect vehicle, as it were, to use in a defense of offensive speech. After all, it is axiomatic that the First Amendment exists to protect

unpopular, unusual, and controversial expression. Moreover, the protections traditionally offered to offensive speech are being slowly and dangerously eroded. The law challenged here imbues the DMV with stunning discretion, and it exemplifies how our increasing cultural timidity—a personal-political correctness—is turning into a frightening movement to suppress and eliminate "offensive" speech.

We particularly see this skittishness on college campuses—many of which are government-run—where the reigning belief is now that if someone is offended, then someone else must be guilty of something. *See generally* Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (2012). We also see it in the speech laws that are creeping across Europe, criminalizing everything from racist tweets to asking a police officer, "is your horse gay?" John O'Sullivan, *No Offense: The New Threats to Free Speech*, Wall St. J., Oct. 31, 2014, http://goo.gl/GfdcXb. And we see it when the residents of a Massachusetts town, perhaps trying to recapture their Puritan roots, imposed a $20 fine for public profanity. Editorial, *First Amendment Be Damned*, N.Y. Times, June 17, 2012, http://goo.gl/Zt2J2i.[6]

Fortunately, this Court is one of free expression's greatest champions. Time and again, it has reminded people all over the world what a true commitment to the freedom of speech looks like. Alas it is a lesson

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[6] As far as treatment of bad behavior goes, *amici* prefer the subtle social pressures of the fictional Stars Hollow, Connecticut, *see generally Gilmore Girls* (Warner Bros. 2000-2007), to those heavy-handed tin-ears of Middleborough, Mass.

that needs constant repetition as would-be censors raise new arguments in old wineskins. It is time for this Court to assert that offensive speech is not just tolerated in free society, it is welcome.

Offensive speech is valuable for two main reasons. First, it contributes to the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). It helps establish the parameters for public discourse, and in so doing expands what can be acceptably discussed.

Second, the right to speak or behave offensively is an essential aspect of personal autonomy. Offending prevailing mores and values is as crucial to defining oneself as supporting them is. A bottled-up offensive person is as uncomfortable as a Victorian at a punk concert—and both need each other for definition. By offending, a person stakes a claim to an identity that is crucial to her development as a human being. The government has no role in constraining that development within the boundaries delineated by the Texas DMV Board or any other government entity.

Now, *amici* take no position on whether state-issued specialty license plates qualify as government speech or whether there is a "quasi-public forum" here—or any other brand of legal artifice. Nor do we take issue with reasonable time, place, and manner restrictions on offensive speech (or other kinds of protected speech). Still, if this Court rules that specialty plates constitute private speech, *amici* do contest the Texas DMV's mission to eradicate speech that "might be offensive to any member of the

public." *Amici* are, well, offended by both the breadth of the Texas statute and the insouciance it shows toward the role that offensive speech plays in society.

A law explicitly banning "political speech" would receive no quarter from any federal court—battles over campaign-finance laws aside—and it is time that offensive speech receive the same protection, particularly at a time when foreign laws prohibiting offensive speech lap against our shores and speech codes threaten to spill over from our campuses. A free society should not walk on eggshells, it should sleep on nails. Freedom produces barbs, points, and rough edges, and any attempt to sand those down will not only result in less freedom, it will create a less interesting, dynamic, and robust society.

ARGUMENT: THIS COURT SHOULD CONTINUE TO PROTECT OFFENSIVE SPEECH

I. OFFENSIVE SPEECH CONTRIBUTES TO THE MARKETPLACE OF IDEAS

The borderlands of the marketplace of ideas are inhabited by ideas that unsettle and offend. Only those ideas that people are allowed to express can be freely traded, so a "free trade in ideas" cannot exist when some ideas are relegated to the black market. *Abrams*, 250 U.S. at 630. Indeed, because offensive speech changes the parameters of the marketplace, it is as vital to the exchange of ideas as so-called mainstream speech. Without expanding the borders of the marketplace, a society may stagnate. If no one ever offensively says "the Emperor has no clothes" then a society may be condemned to dynasties of naked emperors, and *that* would be truly offensive.

In *Whitney v. California*, Justice Brandeis observed that, at one time, "[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). This is certainly true, but before scientists and thinkers could show that there are not in fact witches, someone needed to offend, to create room for inquiry through mockery, crudeness, and ribaldry. In fact:

> Everything we know about the world—the age of our civilization, species, planet, and universe; the stuff we're made of; the laws that govern matter and energy; the workings of the body and brain—came as insults to the sacred dogma of the day. We now know that the beloved convictions of every time and culture may be decisively falsified, doubtless including some we hold today.

Steven Pinker, *No Free Speech Means No Freedom: There Is No Real Democracy Without Debate, Satire, and Discussion*, Boston Globe, Jan. 27, 2015, at A11.

What was once offensive will often become mainstream, sometimes because a previously obnoxious opinion is now accepted as fact, sometimes because a previously repulsive word becomes commonplace. In *Bethel School District*, Justice Stevens began his dissent by recalling a classic case of offensiveness:

> "Frankly, my dear, I don't give a damn."
>
> When I was a high school student, the use of those words in a public forum shocked the Nation. Today Clark Gable's four-letter expletive is less offensive than it was then.

Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 691 (1986) (Stevens, J., dissenting).

That "damn" would be considered offensive seems almost silly today, and surely some of what is offensive today will seem innocuous in the future—but only if offensive speech continues to be freely traded. This evolution of expression not only speaks to the ability of offensive speech to change the parameters of the marketplace of ideas, it underscores the indomitability of the offensive person who, like water, will always find a way.

There is no end-point to offensiveness, just the latest iteration. In 2012's blockbuster hit *The Avengers*, the villain calls a protagonist a "mewling quim." *The Avengers* (Marvel Studios 2012). While the insult would have "drawn audible gasps" from 19th century Londoners, modern crowds hardly noticed. Matthew J.X. Malady, *No Offense: Profanity is Changing. For the Better*, Slate.com, July 1, 2013, http://goo.gl/CxU8v9; see also Christopher M. Fairman, *Fuck: Word Taboo and Protecting Our First Amendment Liberties* 31-53 (2009).

Yet even the progression of profanity can help shape the world around us for the better. Changing concepts of vulgarity help remove taboos, and when taboos are removed the conversation can change direction, often for the better.

The field of sex research, for example, has been historically hindered by the influence of taboos. According to famed sex researches William Masters and Virginia Johnson, sex research in the late 1950s was "governed by fear—fear of public opinion fear of religious intolerance, fear of political pressure, and, above all, fear of bigotry and prejudice—as

much within as without the professional world." Mary Roach, *Bonk: The Curious Coupling of Science and Sex* 11 (2008).

As a result of those taboos, scientific research into one of the most basic and necessary components of human life was retarded and millions of people with sexual dysfunctions—from infertility to impotence—were worse off. Victorian physicians "even practiced gynecology and urology on women *without looking*." *Id.* at 13. Early scientists tried to focus their studies on fertility, obstetrics, gynecology, and venereal disease, yet even those scientists became the victims of rigid and unchallenged taboos.

> Gynecologist James Platt White was expelled from the American Medical Association in 1851 after inviting medical students to observe a (consenting) woman in labor and delivery. His colleagues had been outraged over the impropriety of a male doctor looking at female genitalia. In 1875, a gynecologist named Emo Nograth was booed while delivering a talk on venereal disease at the newly formed American Gynecological Society. The sex researcher and historian Vern Bullough, in the 1970s, landed on an FBI list of dangerous Americans for his "subversive activities" (e.g. publishing scholarly papers about prostitution and working for the American Civil Liberties Union to decriminalize, among other things, oral sex and the wearing of dresses by men).

Id. at 13-14.

Some researchers, like John B. Watson, helped push taboos away because sex "is admittedly the

thing that causes the most shipwrecks in the happiness of men and women. And yet our scientific information is so meager." *Id.* at 26. Even though intrepid sex researchers like Masters and Johnson helped break down these walls, scientists—as a whole—are not known for flaunting conventional taboos, particularly when grants and funding are on the line. Instead, our conversations on sex—and consequently our knowledge of the science of sex—were changed by the commentators and comedians who push taboos not just to be funny, but to deconstruct societal hang-ups.

When Lenny Bruce was arrested at San Francisco's Jazz Workshop in October 1961, the arresting officer told him that he "took offense" at Bruce's act because he couldn't see "any right, any way you can break this word down [the word Bruce used was "cocksucker"], our society is not geared to it." Ronald K.L. Collins & David M. Skover, *The Trials of Lenny Bruce: The Rise and Fall of an American Icon* (2002). Bruce responded "You break it down by talking about it." *Id.*

When Bruce performed, "[p]eople couldn't believe their ears. He gave public voice to their most guarded thoughts about religion prejudice, sex, and violence. He violated taboos with murderous impunity." *Id.* Yet Bruce's impertinence served a purpose. Said Ralph Gleason, a cultural critic and witness at Bruce's trial, "The theme of the performance on the night in question was a social criticism of stereotypes and of the hypocrisy of contemporary society." *Id.* Another witness, *amicus* Nat Hentoff, remarked that "it is in Lenny Bruce—and only in him—that there has emerged a

cohesively 'new' comedy of nakedly honest moral rage at the deceptions all down the line in our society. Coursing through everything he does, however, is a serious search for values that are more than security blankets." *Id.*

Offensive people like Bruce break down the walls between the sacred and the profane, walls that sometimes need to be destroyed. Bruce "reminds us why humor is no laughing matter—why satire and ridicule, even when puerile and tasteless, are terrifying to autocrats and protected by democracies." Pinker, *supra.*

Or take comedy legend Richard Pryor, who pushed social conventions to illustrate an under-examined corner of the American experience. As his *New York Times* obituary described, Pryor "prowled the stage like a restless cat, dispensing what critics regarded as the most poignant and penetrating comedic view of African-American life ever afforded the American public." Mel Watkins, *Iconoclastic Comedian, Dies at 65*, N.Y. Times, Dec. 11, 2005, http://www.nytimes.com/2005/12/11/arts/11pryor.html. What made him so fresh and influential was that he combined the seemingly irreconcilable traits that make satirists successful: "He was volatile yet vulnerable, crass but sensitive, streetwise and cocky but somehow still diffident and anxious. And he could unleash an astonishing array of dramatic and comic skills to win acceptance and approval for a kind of stark humor." *Id.* And he did not think twice about offending those who heard his brand of comedy. Pryor's "often harsh observations and explicit language did offend some audiences. But he insistently presented characters with little or no

distortion. 'A lie is profanity,' he explained. 'A lie is the worst thing in the world. Art is the ability to tell the truth, especially about oneself.'" *Id.*

A society that protects its most sacred objects and beliefs from offense is one that will soon be ruled by naked emperors.

> Satire can stealthily challenge assumptions that are second nature to an audience by forcing them to see that those assumptions lead to consequences that everyone recognizes are absurd.
>
> That's why humor so often serves as an accelerant to social progress. Eighteenth-century wiseguys like Voltaire, Swift, and Johnson ridiculed the wars, oppressions, and cruel practices of their day. In the 1960s, comedians and artists portrayed racists as thick-witted Neanderthals and Vietnam hawks and nuclear cold warriors as amoral psychopaths. The Soviet Union and its satellites had a rich underground current of satire, as in the common definition of the two Cold War ideologies: "Capitalism is the exploitation of man by man; Communism is the exact opposite."
>
> We use barbed speech to undermine not just political dictators but the petty oppressors of everyday life: the tyrannical boss, the sanctimonious preacher, the blowhard at the bar, the neighborhood enforcer of stifling norms.

Pinker, *supra.*

Or, in the words of Salman Rushdie, who certainly knows something about offending people: "What is freedom of expression? Without the freedom to offend, it ceases to exist. Without the freedom to challenge, even to satirise all orthodoxies, including religious orthodoxies, it ceases to exist." Salman Rushdie, *A Pen Against the Sword; In Good Faith*, Newsweek, Feb. 12, 1990, at 52.

II. OFFENSIVE SPEECH FOSTERS SELF-EXPRESSION AND HELPS DEVELOP PERSONAL AUTONOMY

Expressing one's deepest thoughts, feelings, and values is vital to defining oneself as a unique and autonomous individual. Those who are restrained from self-expression are often called "repressed," and years of therapy is often the cure. *See, e.g.*, Dr. Michael Fenichel, *Repression: Anxiety Filter for the Ego*, http://www.fenichel.com/repression.shtml (last visited Feb. 16, 2015). As Justice Thurgood Marshall wrote in *Procunier v. Martinez*:

> The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity. Such restraint may be "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him." J. Milton, *Aeropagitica*.

416 U.S. 396, 427-28 (1974) (Marshall, J., concurring) (citations omitted).

Even more than "mainstream" speech, offensive speech helps define us. Our commonalities do less to define our personalities than our eccentricities, offensive or otherwise. If speech is squelched by the government because it "might be offensive to any member of the public," then the government has closed off an important avenue for self-expression.

To give a rather obvious example, every October 11 the gay-rights organization Human Rights Campaign celebrates "National Coming Out Day" to "celebrate coming out as lesbian, gay, bisexual, transgender, queer (LGBTQ) or as an ally." Human Rights Campaign, National Coming Out Day, http://www.hrc.org/resources/entry/ national-coming-out-day. Coming out is seen as one of the most "basic tools" for combating discrimination and for asserting the deepest values and thoughts of the LGBT community. *Id.* Coming out is difficult precisely because the LGBT identity offends so many.

For the LGBT community, expressing one's sexual orientation is as important as practicing it. Coming out is often seen as the final piece of putting together and accepting one's personal identity, as well as contributing to social acceptance.[7] Although

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[7] One member of this Court recently recognized this dynamic. *See* Lou Chibarro Jr., *'Don't' Paint Me as Anti-Gay,' Says Scalia*, Wash. Blade, Feb. 13, 2015, http://www.washingtonblade.com/2015/02/13/dont-paint-anti-gay-says-scalia (Ginsburg, J., opining that the fact that "people who once hid what they were have announced to the world this is who I am" has contributed to societal change).

one could be a member of the LGBT community even before coming out, it is the *expression* of that membership that is a vitally important speech-act. In the words of Sir Ian McKellen, the acclaimed British actor who didn't come out until he was 49, "Anyone in public life who comes out, comes out primarily for themselves, and their life is immediately improved." Heather Saul, *Sir Ian McKellen on His Gravestone: Here Lies Gandalf. He Came Out*, The Independent, Feb. 22, 2014, http://goo.gl/GRUYyl. McKellen has even said that he'd like the fact that he came out to be printed on his gravestone. *Id.*

Similarly, for offensive people, the expression of offending opinions is a vitally important act that defines and solidifies their personalities. Like stigmatized sexual identities, when offensive opinions are not expressed they do not cease to exist, they merely fester, and the person hides a part of their true self.

Letting people define themselves through offensive expression also benefits others. It's good to know who the offensive people are and, thus, who you'd like to avoid. Lukianoff, *Unlearning Liberty*, at 29 ("Prohibitions on hateful speech do nothing to stop hate, but they let resentment simmer, and they also prevent you from knowing who the hateful people even are."). Exposed Nazis are better than hidden ones because most people would like to avoid associating with them. Similarly, if someone is offended by gun-rights supporters, pro-choice advocates, University of Texas fans, or, yes, Confederate sympathizers, allowing offensive people to speak can enhance the freedom of association.

This process of self-definition through offensiveness is put on full display in an old joke called "the Aristocrats." The joke is a comedic staple, perhaps going back to vaudeville times, and its longevity is based nearly entirely on its evolving offensiveness. Brian Logan, *The Verdict: In The Aristocrats, US Comics Tell 'The Dirtiest Joke in History.' What Do UK Comics Think of It?*, The Guardian, Sept. 1, 2005, http://goo.gl/RqyrHO. The joke has three simple parts: 1) a setup describing a family entering a talent agent's office saying they have an act he should see; 2) a description of the act in which the joke-teller invents the most offensive and obscene act that he/she can imagine; 3) when the shocked talent agent asks for the name of the act, the family says "The Aristocrats." The comedian is challenged to be as offensive as possible, with each new version one-upping the previous one. In the movie of the same name, co-produced by Cato's H.L. Mencken Fellow Penn Jillette, many famous comedians tell their version of the joke. *The Aristocrats* (ThinkFilm 2005). As each comedian tells the joke, the self-expressive aspect of offensiveness becomes clear.[8] As comedian George Carlin said about telling the joke, "we're different, we're in here, there's no rules wait until you hear this." *Id.*

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[8] Bob Saget—best known for starring as the beleaguered *pater familias* Danny Tanner in the ultra-saccharine family sitcom *Full House* (ABC 1987-95), as well as becoming the first host of *America's Funniest Home Videos* (ABC 1989-97)—tells the filthiest version of "The Aristocrats." Some people might be better off blissfully ignorant of Danny Tanner's potty mouth, but isn't America enriched by the full range of Saget's talent?

As offensive speakers struggle to define themselves, they invent new forms of offensiveness. *Amici* personally and professionally interact with many innovators in offensiveness, and indeed some people consider *amici* themselves to be innovative offenders. As long as humans are defining themselves by their offensiveness, there will always be new realms of offensiveness to uncover.

III. OFFENSIVE SPEECH IS UNDER ATTACK

A. OFFENSIVE SPEECH IS UNDER ATTACK THROUGHOUT THE WESTERN WORLD

The First Amendment provides much stronger protections for offensive speech than exists anywhere else in the world. "American protection of freedom of expression is generally stronger than that represented by an emerging multi-national consensus." Frederick Schauer, *The Exceptional First Amendment* (KSG Working Paper No. RWP05-021, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668543. Throughout the Western world, speech-censoring laws have become increasingly common.

Shortly after the *Charlie Hebdo* massacre, the vile French comedian Dieudonné was arrested for a Facebook post that allegedly incited terrorism. Dieudonné's unquestionably offensive post seemed to champion the actions of Amedy Coulibaly, who took hostages in a kosher supermarket the day after the *Charlie Hebdo* attack. Laurence Dodds, *Who is Dieudonné, the French Comedian on Trial for Condoning the Charlie Hebdo Attacks?*, The Telegraph, Feb. 3, 2015, http://goo.gl/0otjFb. Now,

Dieudonné may well advocate the use of violence—*amici* have no quarrel with laws against incitement or true threats—yet here he is being prosecuted for merely expressing sympathy for the attackers.

Indeed, since the *Charlie Hebdo* tragedy, 37 people have been charged under the same law as Dieudonné. *Id.* This includes a one-year prison sentence for "a 22 year old man who posted a video mocking murdered policemen," and a 20-year-old man who, while unarmed himself, was jailed "for yelling 'long live the Kalashnikov' [referring to the AK-47] at police in a shopping centre." *Id.*

Entertainers have been increasingly under attack throughout the West. Some examples:

- In Canada, comedian Guy Earle was fined $15,000 for "offensive, irreverent, and inappropriate speech towards a lesbian audience member in a comedy club. Justice Jon Sigurdson of the Supreme Court of Canada emphasized that comedy clubs are not "zones of absolute immunity from human rights legislation." Tristan Hopper, *Court Upholds Decision to Fine Guy Earle $15K for Insulting Lorna Pardy*, Nat'l Post, June 23, 2013, http://goo.gl/oaI8o7.
- Polish pop star Dorota Rabczewska, or "Doda," was fined approximately $1,500 for blasphemy. In an interview, Doda said she "doubted the Christian holy book because it's hard to believe in something that was written by someone drunk on wine and smoking some herbs." Sara Dover, *Polish Superstar Doda*

Fined for Blasphemy, Int'l Business Times, Jan 17, 2012, http://goo.gl/3eTZAd.[9]

- In Germany, comedian Dieter Nuhr has been repeatedly investigated for hate speech for questioning whether Islam is a religion of peace. Barry Duke, *Comedian Is Accused of 'Hate Speech,'* The Free Thinker, Oct. 27, 2014, http://goo.gl/LWo64z.
- Beloved American songsmith Bob Dylan was charged with violating French laws for comparing Croatians to Nazis and the KKK in a *Rolling Stone* magazine interview. Charges were dropped because Dylan did not okay the publication of the interview in France. The magazine, however, is still under investigation. Marc Hogan, *Bob Dylan Cleared in French 'Hate Speech' Case*, Spin.com, Apr. 16, 2014, http://goo.gl/6SJboF.

This all goes without mentioning some of the higher-profile speech-prosecutions of recent years, like the pursuit of Mark Steyn in various Canadian "human rights" bodies for offending Muslims. *See, e.g.*, Mark Hemingway, *Idiot's Guide to Completely Idiotic Canadian 'Human Rights' Tribunals*, Nat'l Rev. Online, June 5, 2008, http://goo.gl/0zlUbl.[10]

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[9] Some people, such as Vladimir Putin, might be offended by the inclusion of Poland in a list of *Western* nations. Many more might be offended by any questioning of Poland's inclusion in such a list. Either way, historians and pundits should evaluate such questions, not government officials.

[10] For those not offended by citations to Wikipedia, see a thorough description of the Steyn denouement in *Human Rights Complaints Against Maclean's Magazine*, Wikipedia,

It is not just words that the "offended" hope to silence, but thoughts. As Ezra Levant, Canadian TV personality and former publisher of the *Western Standard*, said when questioned by the Alberta Human Rights and Citizenship Commission about his "intent" in republishing the famous Danish Mohammed cartoons:

> We published those cartoons for the intention and purpose of exercising our inalienable rights as freeborn Albertans to publish whatever the hell we want, no matter whatever the hell you think it's my right to do so for reasonable intentions, and it's my right to do so for extremely unreasonable purposes. I refuse to concede to you that what my political thoughts in my mind are or my heart are will determine whether or not an artifact is legal or illegal it's obvious that you're hunting for a thought crime.

What Was Your Intent?, YouTube.com, Jan. 12, 2008, https://www.youtube.com/watch?v=3iMNM1tef7g.

And sometimes no laws are necessary to stifle expression that, while itself of obvious scholarly value, may still offend. *See, e.g.*, Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. Times, Aug. 13, 2009, http://www.nytimes.com/2009/08/13/books/13book.html (important book about the controversial Danish cartoons, *The Cartoons That*

(continued...)

http://en.wikipedia.org/wiki/Human_rights_complaints_against_Maclean's_magazine (last visited Feb. 16, 2015).

Shook the World, was published without the reader being able to see what all the fuss was about).

While laws prohibiting blasphemy and other "offensive" speech should be First Amendment nonstarters, *amici* have good reason to be concerned that, without this Court's clear guidance, such laws will soon come to America. *See, e.g.*, Edward Schumacher-Matos, *Last Thoughts: NPR And The Balance Between Ethics And The Nation*, NPR.com, Feb. 6, 2015, http://goo.gl/h9kFDA (outgoing NPR ombudsman claims that *Charlie Hebdo* would not be protected under the First Amendment because it made "fun" of people's "prophets and gods" and constituted "hate speech"); *but see* Hans Bader, *NPR Wrongly Suggests Hate Speech and Blasphemy Are Unprotected by First Amendment*, Competitive Enterp. Inst., Feb. 11, 2015, http://goo.gl/Hrr5wA (summarizing this Court's precedent). Sometimes that guidance can come in unlikely places, such as a case about license plates.

B. OFFENSIVE SPEECH IS UNDER ATTACK ON COLLEGE CAMPUSES

The spirit of Galileo must have reeled when an editorial was published in the *Harvard Crimson* advocating for an end to the doctrine of academic freedom. Sandra Y.L. Korn, *The Doctrine of Academic Freedom*, Harvard Crimson, Feb. 18, 2014, http://goo.gl/udf3sn. According to the author, academic freedom should be replaced by "academic justice," a vague and ill-defined term that seems primarily based on not offending people. "When an academic community observes research promoting or

justifying oppression, it should ensure that this research doesn't continue." *Id.*[11]

Even more recently, after the University of Chicago issued a report addressing the freedom of expression on campus, the *Chicago Maroon*, the long-time student newspaper, took issue with the report's "commitment to free, robust, and uninhibited debate and deliberation among all members of the community." Editorial, *Land of the Free*, Chicago Maroon, Jan. 9, 2015, http://goo.gl/HU5DtT. That commitment to free speech, which closely resembles the First Amendment's commitment to free speech as articulated by this Court, was apparently too broad. "The University needs to clearly differentiate hate speech and *offensive speech*," wrote the editorial board, and "the University must maintain a consistent commitment to eradicating hate speech and harassment in campus discussion." *Id.* (emphasis added).

And just the week before this brief went to press, news broke that the University of Michigan—unlike Harvard and Chicago a state school—had launched a $16,000 campaign to eradicate "certain words and phrases that could be considered offensive." *University of Michigan Launches $16,000 Inclusive Language Campaign*, Aol.com, Feb. 10, 2015, http://www.aol.com/article/2015/02/10/these-words-are-offensive-says-university-of-michigan/21141245. Apparently the University of Maryland started a similar program in 2012. *Id.*

Torquemada blushes.

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[11] What constitutes "oppression" is unclear, but the rest of the article suggests it includes supporting Israel's right to exist.

Attacks on free speech on college campuses, in particular the freedom to offend, have risen to the level of an epidemic. Students are being taught that "real" freedom of speech necessitates censorship. See, generally, Lukianoff, *supra*. In an America run by most modern college administrators, Nazis would not be allowed to march in Skokie, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977), the Phelps family would not be allowed to protest funerals, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), and the KKK would certainly not be allowed to have a rally, whether it incites violence or not, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In short, the America that many college campus administrators envision is a dystopian Pleasantville.

These speech-repressive campus regimes are not just harming students while on campus. Those students will become censorious voters, and "offensive" speech's days might be numbered. As Greg Lukianoff, the president of the Foundation for Individual Rights in Education has written:

> Administrators have been able to convince well-meaning students to accept outright censorship by creating the impression that freedom of speech is somehow the enemy of social progress. When students began leaving college with that lesson under their belts, it was only a matter of time before the cultivation of bad intellectual habits on campus started harming the dialogue of our entire country. The tactics and attitudes that shut down speech on campus are bleeding into larger society and wreaking havoc on the way we talk among ourselves.

Lukianoff, *Unlearning Liberty*, at 5 (2012).

Unfortunately, speech codes are popping up in colleges and universities, the very places where speech should be "uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). And "uninhibited, robust, and wide open" debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on orthodoxies and received wisdoms. *Id.*

> Many of us have been conditioned to apologize for words that offend, when open debate is bound to create some offense. Indeed, it should happen. Being offended is what happens when you have your deepest beliefs challenged, and if you make it through four years of college without having your deepest beliefs challenged, you should ask for your money back.

Lukianoff, *Unlearning Liberty*, at 51.

Inevitably, the campus inquisition against offensive speech is affecting entertainment. Chris Rock has "stopped playing colleges" because of the students "social views and their willingness not to offend anybody." Frank Rich, *In Conversation: Chris Rock*, Vulture.com, Nov. 30, 2014, http://goo.gl/kcuZfV Says Rock:

> Kids raised on a culture of "We're not going to keep score in the game because we don't want anybody to lose." Or just ignoring race to a fault. You can't say "the black kid over there." No, it's the "guy with the red shoes." You can't even be offensive on your way to being inoffensive." [Playing on campuses] is not as much fun as it used to be. I remember talking

> to George Carlin before he died and him saying the exact same thing.

Id. Chris Rock's raunchy, edgy, discomfiting comedy picks up where the late, great, very funny and very offensive Richard Pryor left off.

Amici believe that if speech codes from campuses spill over into the rest of the country, and if this Court doesn't continue to take a firm stand in protecting offensive speech and understanding how offensive speech contributes to a free society, then all offensive entertainment could be threatened.

CONCLUSION

It would be offensive to the First Amendment for this Court allow Texas to tell us what is offensive. After all, one man's offensive speech is another's exercise of social commentary or personal expression. This Court should affirm the judgment below and let putative offenders be judged in the court of public opinion.

Respectfully submitted,

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JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL., RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CHILDREN FIRST FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

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INTEREST OF *AMICUS*[1]

Amicus is Children First Foundation, Inc. ("CFF"), a New York nonprofit corporation that promotes adoption as a positive choice for women facing unwanted pregnancies or newborn babies in New York, New Jersey, and Connecticut. CFF raises funds to support healthcare facilities that serve these pregnant women. CFF was founded after Elizabeth and Charles Rex adopted two children born to young women with unplanned pregnancies who chose life and adoption for the children they birthed. *Amicus* submits this brief in support of Respondents, Texas Division, Sons of Confederate Veterans, Inc., *et al.*

CFF is interested in this case because vital free speech principles are at stake and it is currently party to a case pending before the United States Court of Appeals for the Second Circuit, *see Children First Found., Inc. v. Fiala*, No. 11-5199 (2d Cir.), which will likely be impacted greatly by the outcome of this litigation.

Similar to Texas, New York opened up a forum in which individuals and nonprofit organizations were invited to create specialty license plates

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either or neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

bearing customized messages in favor of their own cause. Begun in 1992, New York's custom plate program was initiated and advertised with the slogan "Take Your Pride for a Ride." To procure a custom plate, an applicant was required to be (1) a nonprofit corporation registered in New York; (2) have a sponsoring agency or organization as the main point of contact; and (3) pay a $5000 deposit that is refunded if two hundred plates are sold within a three-year period. *See Children First Found., Inc. v. Martinez*, 829 F. Supp. 2d 47, 52 (N.D.N.Y. 2011). Upon obtaining a "custom plate development kit," the applicant submits a group information form and the designed artwork that fits within the space dimensions and template for a license plate (a smaller portion of space on the left side of the plate for a "logo" and a larger segment of space along the bottom of the plate for a "tagline"), and other "administrative" details. *Id.* Individuals and organizations looking to acquire a plate bearing a customized logo and message must pay an additional fee beyond the price of a standard-issue plate. *See* N.Y. Veh. & Traf. Law § 404(1).

Under this system, approximately 260 different specialty plates from eight wide-ranging categories (I Love NY Adventure, Sports, Military and Veterans, Counties and Regions of New York, Colleges, Fraternities, and Sororities, Causes, Professions, and Organizations) have access to the speech forum. These specialty license plates support an eclectic variety of educational, artistic, social, environmental, and healthcare-related causes, and are sponsored by a wide variety of

recreational, occupational, associational, political, social, and religious organizations.

But when CFF submitted a custom plate design bearing its logo, a simulated crayon drawing of two children's smiling faces in front of a yellow sun, and its tagline, "Choose Life," their organizational plate application was denied. Government officials concluded—in their "discretion"—that "a significant segment of the population" would find CFF's speech to be "patently offensive" and CFF needed to steer clear of "controversial issues." *CFF*, 829 F. Supp. 2d at 52-53. Officials further surmised that CFF had an "inten[t] to draw attention to...the abortion debate," and, without any evidence, declared that public hostility to CFF's speech was so "emotionally charged" that it would "engender violent discourse among drivers," elicit "road rage and aggressive driving." *Id.*

Yet in more than half of the States in the Nation (including Texas), the same or similar plate is available to motorists with no apparent adverse effects.[2] Thus, the denial of CFF's custom plate in New York evidences textbook viewpoint

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[2] Custom plates bearing the phrase "Choose Life" and essentially the same logo are available for purchase in twenty-nine states and the District of Columbia. *See* http://www.choose-life.org/other-states.php (showing images of "Choose Life" license plates available in Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia) (last accessed Feb. 13. 2015).

discrimination and unbridled discretion similar to what the Respondents experienced in Texas. Therefore, although CFF may not agree with what the Respondents say (or what their speech may symbolize to others) CFF will nonetheless defend their right to say it within the speech forum Texas created. The First Amendment, after all, rests on the "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

SUMMARY OF ARGUMENT

This case is about whether government may silence viewpoints it finds distasteful, offensive, and controversial from a license plate forum opened for a panoply of private speech and expression. Apparently, everything is bigger in Texas, except for Petitioners' view of the First Amendment. But Constitutional protections do not shrink just because a speech forum may be physically small, *i.e.*, a 6 inch by 12 inch piece of metal rather than a public park or other public forum.

License plates affixed to privately-owned vehicles and bearing customized messages or symbols designed by private organizations and voluntarily selected by an individual for an extra fee communicate private speech readily associated with the sponsoring organization and the vehicle operator. Texas, having purposefully created a forum for such private expression on license plates, may not neuter the Free Speech Clause by decreeing that messages chosen and crafted by

private organizations and individuals for their own vehicles constitutes government speech not subject to First Amendment scrutiny. This would overturn long-standing precedents of this Court and render the Free Speech Clause functionally impotent in government-created speech fora, permitting the unfettered and unbridled discretion of government officials to stamp out ideas they find offensive and silence speech they subjectively dislike. But speech is protected by the First Amendment precisely because some might find it troubling or offensive.

ARGUMENT

I. The Respondents' proposed license plate bearing the Confederate flag is private speech entitled to the full protection of the First Amendment.

Customized license plate logos and messages of the sort at issue in this case represent private speech subject to the full protection of the First Amendment. This Court's own precedent establishes this principle. It does not need a tune-up, let alone a recall, particularly as it has functioned well for decades.

A. Specialty license plates bearing customized messages and symbols communicate speech by the sponsoring organization and the vehicle operator.

Thirty-eight years ago, in the only decision of this Court directly addressing license plates and the First Amendment, this Court recognized that engraved messages on standardized, state-issued

license plates implicated the driver's free speech rights. *See Wooley v. Maynard*, 430 U.S. 705 (1977). By legislative enactment, New Hampshire required registered passenger vehicles to bear license plates displaying the state motto, "Live Free or Die." *Wooley*, 430 U.S. at 707. A religious minority couple objected to this slogan and challenged the constitutionality of the statute which effectively required them to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 713, 715.

In *Wooley*, this Court held that the State could not force individuals to disseminate government messages on their license plates, even if display of the state motto "facilitates the identification of passenger vehicles," promotes "appreciation of history, individualism, and state pride," and "most individuals agree with the thrust of New Hampshire's motto." *Id.* at 715-16. This Court emphasized that the First Amendment protects an individual's rights to "speak freely," to "refrain from speaking at all," to "hold a point of view different from the majority" and to "refuse to foster ... an idea they find morally objectionable." *Id.* at 714-15. Because the automobile is "readily associated with its operator" and driving a vehicle is both a "virtual necessity for most Americans" and a part of "daily life" constantly "in public view," the First Amendment protects an individual from becoming an "instrument" or "courier" for what he or she deems an "unacceptable" message. *Id.* at 715, 717, n. 15.

Since *Wooley*, the private expression associated with vehicle license plates has expanded

significantly. All 50 States and the District of Columbia now allow drivers, for an additional fee, to obtain specialty license plates bearing customized messages and symbols rather than the standard-issue, single option plates involved in *Wooley*. For example, a Texas driver may currently choose from more than 370 specialty license plate options (including a "Choose Life" plate).[3] In comparison, New York drivers may choose from approximately 260 options (but no "Choose Life" plate, yet).[4] Such a proliferation of custom license plates confirms what this Court recognized in *Wooley*: a vehicle is a "mobile billboard" in public view that is "readily associated with its operator." Many of these new license plates are specifically designed, funded, and marketed to drivers by a sponsoring organization.

In light of such widespread expansion of custom license plates across the country and the close involvement of private organizations in their creation and design, it is not surprising that five

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[3] *See* http://txdmv.gov/motorists/license-plates/specialty-license-plates (last accessed Feb. 13, 2015).

[4] *See* http://dmv.ny.gov/nav/custom-plates (last accessed Feb. 13, 2015). The United States District Court for the Northern District of New York held that New York's denial of CFF's "Choose Life" plate was unconstitutional on multiple grounds, including impermissible viewpoint discrimination. The District Court also stated that the denial was unreasonable based upon the purpose of the custom plate forum, and that the denial was the result of unbridled discretion. The District Court granted summary judgment on CFF's free speech claims but stayed execution of the judgment pending the filing of a timely appeal, which New York filed. *See CFF*, 829 F. Supp. 2d at 54-67.

Circuits have held that license plates bearing customized messages constitute private speech subject to free speech protections rather than government speech outside the purview of the First Amendment. *See Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394-96 (5th Cir. 2014) ("[S]pecialty license plates are private speech."); *Roach v. Stouffer*, 560 F.3d 860, 867-68 (8th Cir. 2009) (customized plates are private speech); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("Messages on specialty license plates cannot be characterized as the government's speech."); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("Choose Life" plate with logo depicting faces of two young children was private speech); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) ("SCV's special plates constitute private speech.").[5]

What is surprising, however, are the confusing turns the courts of appeal made to arrive at this destination. The Fifth, Seventh and Eighth Circuits applied a "reasonable observer" test to determine whether a reasonable person observing the circumstances would consider the speaker to be the government or a private party. *Vandergriff*, 759

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[5] The sole outlier among the Circuit courts is the Sixth Circuit's decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) ("Choose Life" specialty plate found to be government speech). But, for reasons discussed further in Section I.C, *infra*, the *Bredesen* case presents a readily distinguishable set of facts—namely, a specific legislative statute authorizing and creating a state-sponsored "Choose Life" license plate.

F.3d at 394-95; *White*, 547 F.3d at 863-64; *Roach*, 560 F.3d at 867-68. On the other hand, the Fourth and Ninth Circuits considered a four-factor test evaluating the "central purpose" of the license plate program, the "degree of editorial control" over the license plate message, the "identity of the literal speaker," and whether the government or a private entity "bears the ultimate responsibility for the content of the speech," to determine whether the speech on license plates was that of the government, a private party, or both. *SCV*, 288 F.3d at 618 (internal quotations omitted); *Stanton*, 515 F.3d at 965.

These varying tests needlessly complicate and overshadow a simple point that this Court made long ago: license plates bearing messages on privately-owned vehicles implicate the private expression, or speech, of the driver. *See Wooley*, 430 U.S. at 713-15. Custom license plates created, designed, funded, and marketed by private organizations clearly do. Thus, although *Wooley* does not control this entire dispute (Texas is not attempting to compel Respondents to display an anti-Confederate flag message on their bumpers), it certainly drives home the conclusion that messages on vehicles constitute the private speech of the vehicle operator and, in this specialty plate context, the plate's sponsoring organization as well. Because private speech is implicated, so too is the First Amendment.[6]

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[6] In a confounding and irreconcilable twist, Petitioners claim that *Wooley*, a case about individuals' First Amendment rights, protects Texas from being "forced" to allow an

B. Texas may not use the government speech doctrine to shut down private speech.

To circumvent *Wooley* and evade First Amendment scrutiny, Texas (along with other States like New York) seeks to brand all specialty license plates, regardless of their origin and attribution, as government speech. Pet. Br. at 2. Its reason for doing so is unmistakable: the Free Speech Clause "restricts government regulation of private speech" but "does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). However, "[v]ital First Amendment speech principles are at stake here." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

The government speech doctrine exists to protect a government entity's right "to speak for itself...to say what it wishes, and to select the views that it wants to express." *Summum*, 555 U.S. at 467-68 (alternation in original) (citations and internal quotation marks omitted). The doctrine permits the government to "function" so that it can freely speak its chosen messages and advocate in favor of its preferred value judgments, without itself being compelled to sponsor a different view or "heckler's veto." *Id.* at 468.

But the government speech doctrine is not a sword to shut down disfavored, private speech. *See*

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individual's message on a custom license plate. Pet. Br. at 11, 12. But the Free Speech Clause is not a defense available to government, and no individual required Texas to open a specialty plate forum for private expression.

id. at 473 (acknowledging "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint"). This would turn the Free Speech Clause on its head. Yet, that is precisely what Texas is attempting to do. *But see Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (citation and internal quotations omitted).

For the government speech doctrine to be applicable, the government must be speaking on its own, on its own property, and "for the purpose" of conveying its own "permanent" and particular message chosen through a "selectiv[e]" process involving delineated content-based factors. *Summum*, 555 U.S. at 471-73. If the government is not the literal speaker and the speech does not occur on government land, the government must nonetheless be the one driving the "overarching" message "from beginning to end" with absolute and active editorial control "over every word" of the purposeful message being conveyed. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005). Neither situation describes the specialty license plate forum at issue in this case.

In *Summum*, this Court held that 15 permanent monuments displayed in a 2.5 acre public park represented government speech immune from a First Amendment forum analysis. *See* 555 U.S. at 464, 470. The government speech doctrine permitted the city to deny a minority religious

organization's request to erect its own monument in the park similar to the size of the existing Ten Commandments monument. *See id.* at 464-65. The monuments represented government speech because they were (i) "permanent"; (ii) displayed "on government land"—specifically, a public park closely identified with the government unit that "owns the land"; (iii) chosen through a "selective[e]" process that considered multiple "content-based factors" such as "esthetics, history, and local culture"; and (iv) intended "for the purpose" of "conveying" a government "message" to "all who frequent the Park." *Id.* at 470-74.

Likewise distinguishable, the government speech exempt from First Amendment review in *Johanns* was a purposeful federal government campaign to market and promote beef products. *See* 544 U.S. at 560. Two associations whose members were compelled to pay government subsidies on beef sales that were used, among other things, to fund these government-controlled messages, objected to the assessment on First Amendment grounds because they disagreed with the campaign's message. *Id.* at 553-57. But the beef campaign constituted the government's own speech since the "message of the promotional campaign is effectively controlled by the Federal Government itself." *Id.* at 560. By statute and regulation, Congress and the Secretary of Agriculture specified "what the promotional campaigns shall contain...and what they shall not," and "set out the overarching message and some of its elements." *Id.* at 561 (internal citation omitted). Moreover, government officials attended and participated in

meetings at which proposals were developed and "all proposed promotional messages" were reviewed by government officials "for substance and for wording." *Id.* Some proposals were rejected or "rewritten" by the Department of Agriculture, and the Secretary exercised final editorial authority "over every word." *Id.* In short, the government crafted the message "from beginning to end," exempting the speech "from First Amendment scrutiny." *Id.* at 553, 560.[7]

The same indicia of government speech in *Summum* and *Johanns* are not present here. First, the speech is contained on license plates located on privately-owned vehicles. This location is far different than the public park and exclusively government-owned land in *Summum*. Even if Texas asserts technical ownership over the plate itself, Pet. Br. at 20, this is not dispositive because this Court already held that vehicles are "readily associated" with their operators. *Wooley*, 430 U.S. at 717, n. 15.

Second, custom license plates are not "permanent" and are not constrained by finite physical limitations. *Summum*, 555 U.S. at 464, 478-80. Not only may an individual driver choose a

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[7] Government-controlled messaging is also permissible where the government places limits on private organizations' use of public funds. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991) (barring medical providers receiving Title X funds from providing counsel and advice regarding abortion services). *Rust* has no applicability in this case, where the money for the custom plates is derived entirely from private individuals and sponsoring organizations, not the state treasury.

different plate at any time, *Vandergriff*, 759 F.3d at 395, but also, for as long as the plate remains associated with the vehicle it is the individual driver's choice that determines its longevity. Moreover, although the area for speech on a specialty license plate remains standard, there is virtually no limit to the variety of expression it may contain so long as basic statutory requirements are met.

Third, in the particular forum created by Texas, the purpose of the custom license plates is demonstrably not to convey, sponsor, or promulgate a certain government message, as was the intent in both *Summum* and *Johanns*. *See Summum*, 555 U.S. at 471-72 (monuments chosen to portray a particular public "view" and "message" of the city based upon "esthetics, history and local culture"); *Johanns*, 544 U.S. at 560-61 (specific government message on beef products). In contrast, any nonprofit organization is invited to obtain a specialty license plate in Texas—that is, until the message is deemed too unpopular by the government.

Fourth, the customized license plate messages are not chosen through a highly "selective[e]" legislative process involving editorial control, design input, requested modifications, or established content-based criteria to authorize a specific customized message. *Summum*, 555 U.S. at 471-72. Indeed, the customized license plate messages and symbols at issue here are not set "from beginning to end" by the government, are not selected, crafted, designed, or "effectively controlled" by the government, do not represent a

purposeful "overarching message" and value judgment made by the government, and are not edited and rewritten by the government. *Johanns*, 544 U.S. at 560-61. To the contrary, the custom plate is the brainchild of the sponsoring organization applicant. The design and cost of the plate are paid by the private organization, not the government. Indeed, private individuals and organizations take the initiative and choose to spend additional money to obtain a plate displaying a particular message on their privately-owned vehicles. *See Roach*, 560 F.3d at 868; *Stanton*, 515 F.3d at 967.

But for administrative approval of a plate upon completion of a few content-neutral, established guidelines (*e.g.*, nonprofit status and a refundable deposit upon sale of a certain number of plates), Texas is not substantively involved in this process at all. Yet Texas seeks to transform its administrative "approval" into sponsorship and adoption of all messages on all specialty license plates as government speech. Pet. Br. at 14, 23, 34. Yet this "approval" is necessary only to ensure that each plate possesses a unique registration number for identification purposes. Unlike the government speech in *Summum* and *Johanns*, Texas had no active hand in selecting, designing, crafting or editorializing "from beginning to end" the chosen message. "Approval" here is nothing more than a run-of-the-mill licensing or permitting scheme.

When government involvement is strictly clerical, it does not transform private views or expression into governmental endorsement of the message, let alone government speech. *See, e.g.*,

Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990) (that the government "do[es] not endorse everything they fail to censor is not complicated") (plurality opinion); *see also Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981) (creation of forum "does not confer any imprimatur of state approval"). To allow purely administerial involvement to transform private speech to government speech would eviscerate private speech fora altogether.

C. License plates created through legislative enactment are immune from First Amendment scrutiny as long as government does not force individuals to display them.

Not all customized license plates are invariably crafted in the same manner or for the same purpose. As such, there are instances—as in *Berger v. ACLU of North Carolina*, No. 14-35 (U.S. cert. petition pending)—where customized license plates represent government speech immune from First Amendment scrutiny as long as government is not compelling their purchase or display.

For example, North Carolina (similar to South Carolina and Tennessee before it) created state-sponsored license plates bearing the message "Choose Life" through legislative enactment. *See ACLU of North Carolina v. Tata*, 742 F.3d 563, 566 (4th Cir. 2014) (legislature passed a law specifically authorizing the issuance of a "Choose Life" plate).[8]

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[8] *See Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 788 (4th Cir. 2004) ("Choose Life" license plate specifically approved by South Carolina legislature); *see also*

Texas has a similar legislative process—which is entirely separate from the forum at issue in this case—whereby the legislature can create and specifically authorize a custom plate. Tex. Transp. Code Ann. §§ 504.601-663. In fact, through that process, Texas adopted a "Choose Life" license plate. *See id.* § 504.662.

In all of these instances, the government entities, through a highly "selective[e]" process, chose to convey a "permanent" and particular message, *Summum*, 555 U.S. at 471-72, crafted and "effectively controlled" that message "from beginning to end," *Johanns*, 544 U.S. at 560, and communicated that "official" message in public by creating through legislative action state-sponsored plates, *Wooley*, 430 U.S. at 717. The fact that the North Carolina legislature "repeatedly rejected" license plates bearing pro-choice slogans (such as "Respect Choice") only further demonstrates a purposeful act by government to speak and advocate. *Tata*, 742 F.3d at 566. Therefore, legislatively-created license plates constitute government speech outside First Amendment scrutiny so long as no vehicle owner is being compelled to carry such speech on their own bumper. *See Wooley*, 430 U.S. at 715-17. The Fourth Circuit decisions to the contrary were thus wrongly decided.

Bredesen, 441 F.3d at 372, 376 ("The Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated.").

II. Texas engaged in unconstitutional viewpoint discrimination by refusing the Confederate flag plate in a forum created for private speech.

It is "axiomatic" that the government may not regulate private speech based upon "its substantive content or the message it conveys," *Rosenberger*, 515 U.S. at 828, and any regulation permitting such discrimination "cannot be tolerated" under the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). "Discrimination against speech because of its message" is thus presumptively unconstitutional, *Rosenberger*, 515 U.S. at 828, and the government bears the burden of rebutting this presumed invalidity, *see U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). Texas' denial of the Confederate flag plate is indefensible under this well-established analysis.

A. Texas may not exclude an unpopular viewpoint from a forum it created.

Texas elected to open an otherwise closed forum (the space adjacent to and below the registration numbers on state-issued license plates) for private expression. Few restrictions were implemented to limit access to this forum (*i.e.*, monetary deposit, plate commitments, and nonprofit status). Texas was under no constitutional obligation to open such a forum, but having done so, the First Amendment applies. *See Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up" to speaking by some groups, government "may not grant the use of a forum to people whose views it finds acceptable, but deny

use to those wishing to express less favored or more controversial views.").

In both Texas and New York, the State invited nonprofits to promote their causes on specialty license plates for use on privately-owned vehicles. The government was agnostic as to their cause until a group promoting the Confederate flag in Texas and a pro-adoption group in New York tried to access the forum. But, having created a forum for private speech on customized license plates—even if under no obligation to do so in the first place—both States "assumed an obligation" to regulate speech "under applicable constitutional norms," *Widmar*, 454 U.S. at 267, and "respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829.

Regardless of the specific nature of the forum created for specialty license plates, speech "otherwise within the forum's limitations" may not be excluded based upon its viewpoint. *Id.* at 830.[9]

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[9] In a designated public forum, the government has "opened for use" property it owns as "a place for expressive activity," and speakers cannot be excluded nor content-based restrictions allowed without satisfying strict scrutiny. *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). By comparison, in a limited public forum or nonpublic forum, speech restrictions "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Denying access to a speaker "solely to suppress the point of view he espouses on an otherwise includible subject," violates the First Amendment even in a nonpublic forum. *Id.* (internal citations omitted); *see also Rosenberger*, 515 U.S. at 829 (government

"Viewpoint discrimination" is "an egregious form of content discrimination." *Id.* at 829. "Content discrimination" may be permissible if it "preserves the purpose" of a limited public forum, but the distinction between the two "is not a precise one." *Id.* at 830-31.

This Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad.*, 512 U.S. at 642. Content-based restrictions on private speech allow government officials to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). But "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Against this backdrop of First Amendment law, Texas impermissibly targeted an unpopular viewpoint for exclusion—a textbook example of unconstitutional speech discrimination. Texas was not barring the speech because it excluded plates honoring war veterans (in fact, approximately 80 different plates specifically honor members of the armed forces or veterans of different wars) or barred plates with flag logos (at least five plates

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must abstain from regulating speech when speaker's ideology, opinion, or perspective "is the rationale for the restriction").

include images of flags). In fact, as Texas previously conceded, and reaffirms to this Court, the reason the Confederate flag plate was denied is precisely because of the "idea" expressed on the plate—"specifically the confederate flag portion of the plate." Pet. Br. at 1-2, 25, 45. That the plate may be "offensive" to members of the public is reason for protecting the speech not precluding it. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (that a speaker's viewpoint "gives offense" is a reason "for according it constitutional protection").

The government officials that denied CFF's "Choose Life" plate in New York admitted similar displeasure with the ideas and views they identified with CFF's specialty plate. Excluding CFF from speaking on women's health (*e.g.*, plates advocating breast cancer research and domestic violence prevention), children's welfare (*e.g.*, autism awareness and drug-free youth programs), and other issues that are "otherwise permissible" because CFF approaches them "from a [pro-adoption] standpoint" was classic viewpoint discrimination, as the district court found. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Neither New York nor Texas may "favor one speaker over another" or target "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 828-29.

It is imperative that this Court, in delineating the contours of forum analysis, keep in mind the risk that government may use its power "not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate." *Turner Broad.*, 512

U.S. at 641.[10] Yet there is "no more certain antithesis" to the Free Speech Clause than government's usage of private speech restrictions to produce "thoughts and statements" it deems "acceptable" to the public. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). Moreover, the "exclusion of several views" on a "topic of debate" is "just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 515 U.S. at 831-32 (rejecting the claim that "debate is not skewed so long as multiple voices are silenced," and holding instead that "the debate is skewed in multiple ways").[11]

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[10] Government officials rejecting CFF's specialty plate alleged an unwritten practice of insuring that plates "do not present or support" either side of controversial political, religious, or social issues. However, specialty plates bearing "Cop Shot" (featuring a blood splattered logo replete with the "o" in "Shot" pictured in a cross-hair and a tagline that reads "SUPPORT POLICE"), "Knights of Columbus" (a religious fraternal organization), "War on Terror" and "Vietnam War" (wars that are hotly debated), and "Union Yes" (featuring a checked ballot box and the name of a prominent labor union as the tagline), just to name a few, were available. This selective application of the alleged ban on controversial speech is constitutionally impermissible for it allows government to control the marketplace of ideas by "select[ing] the 'permissible subjects for public debate.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citation omitted).

[11] For example, if a State excludes "the entire subject of abortion" from specialty plates and authorizes "neither a pro-life plate nor a pro-choice plate," *White*, 547 F.3d at 855, there is a natural suspicion that this "no plates on the topic of abortion" rule is intended to stifle a particular viewpoint on that topic. This is especially apparent where that "rule" is a post hoc litigation position by the government. Such exclusions run afoul of this Court's precedent in *Rosenberger*

It is also important that the government's reasons for, and interests in, silencing certain speech are scrutinized appropriately. For example, wildly fantastical and factually vacant assertions by a government official that the presence of certain "emotionally charged" logos or taglines on license plates will "engender violent discourse among drivers" and cause "road rage and aggressive driving" are not enough. *See, e.g., CFF*, 829 F. Supp. 2d at 52-53. Such unsubstantiated claims, directed at CFF in New York, obviously ring hollow. *See Lamb's Chapel*, 508 U.S. at 395-96 (rejecting government's argument that denial or use of its property to a "radical" church prevented "threats of public unrest and even violence" because "[t]here is nothing in the record to support such a justification"). If the apparent violent outbreaks are imminent, then one would expect there to be evidence of such violence in States that have permitted comparable plates for years or, in this case, some action taken to curb Confederate-flag bumper stickers.

B. Texas' exclusion of the Confederate flag plate displays the danger in giving government officials unbridled discretion in regulating speech fora.

The First Amendment forbids States from granting government officials unbridled discretion to permit or disallow private speech, yet that is precisely what Texas did here. The danger of "content and viewpoint censorship" of private

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and constitute impermissible viewpoint discrimination under the First Amendment.

speech is "at its zenith" when the determination of "who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988).

"[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Id.* at 763-64. More troubling still, that choice caters to the bureaucratic predisposition to squelch contrarian speech. To avoid this risk, license or permitting schemes must contain "neutral criteria," *id.* at 760, and "narrow, objective, and definite standards" to guide government officials' exercise of authority, *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citation and internal quotations omitted). Otherwise, their unconstrained discretion may become the means for "suppressing a particular point of view." *Id.* (citation and internal quotations omitted).

In Texas, the administrative specialty license plate scheme grants government officials unfettered discretion to exclude private speakers if a proposed plate "might be offensive to any member of the public." Tex. Transp. Code Ann. § 504.801(c). New York provides similar unfettered discretion, allowing government officials to exclude organizational speech if the custom plate is "patently offensive." 15 N.Y. Comp. Codes R. & Regs. § 16.5(e). Such malleable terms are the vehicles for bureaucratic whim and government censorship of unpopular viewpoints. Indeed, the

suppression of CFF's "particular point of view," *Forsyth*, 505 U.S. at 131, was evidenced by New York denying a plate bearing the message "Choose Life" but allowing a plate bearing the highly similar message "Donate Life."

Recognizing the inherent fallibility of such contentless provisions, this Court requires that speech restrictions be limited to objective categories long familiar to this Court, such as "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," all of which are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *U.S. v. Stevens*, 559 U.S. 460, 468-69 (2010) (internal citations and quotations omitted).

A State may, of course, choose to allow only specialty plates created by legislative enactment and thus avoid First Amendment scrutiny so long as citizens are not compelled to carry a government message with which they disagree on their vehicles. Or a State may choose to create a forum that limits the "class of speakers" to nonprofit corporations organized in their state, educational institutions, sports teams, or other such legitimate "subject matter" limitations. States may also institute reasonable time, manner, and place restrictions. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011). In organizational license plate fora, such restrictions may include the size of letters and logos, the number of plate commitments, and the background color of the plate.

But, if a State purposefully chooses to open a forum for a smorgasbord of causes, groups, and organizations to speak (as both Texas and New York did), it must ensure that any speech restrictions in the forum are viewpoint-neutral. Texas plainly did not. It must also eliminate standards that fail to impose specific limitations on government officials' discretion in admitting speech to the forum. Again, Texas did not. Texas' failure to comply with these Constitutional norms after creating a forum for specialty plates abridged the Respondents' rights under the Free Speech Clause of the First Amendment.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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No. 14-144

In the Supreme Court of the United States

JOHN WALKER, III, in his Official Capacity as Chairman of the Board, *et al.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* CHOOSE LIFE, WISCONSIN, INC., ILLINOIS CHOOSE LIFE, INC., AND CHOOSE LIFE AMERICA, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit entities that desire to help raise and/or disburse funds generated by "Choose Life" license plates to benefit at risk and disadvantaged mothers and children. *Amici* also represent (or include as members) drivers who wish to purchase "Choose Life" plates and place them on their vehicles in order to provide financial support for these causes and express their personal views about an important moral issue. Accordingly, *amici* have a strong interest in ensuring that such plates are widely available.

Amici and the pregnancy resource centers they support are deeply committed to fostering the well-being of mothers and children by providing resources to support their health and wellness, and by encouraging and increasing public awareness of adoption alternatives and the value of each individual human life from conception through natural death.

Amicus Choose Life Wisconsin, Inc., applied for permission to create a "Choose Life" specialty plate during the 2013-14 Wisconsin legislative session. Although the House of Representatives passed the legislation and the Senate Transportation Committee passed it, the full Senate failed to bring it up for a vote, effectively killing it.

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. All parties have timely consented to the filing of this brief.

Choose Life Wisconsin intends to bring suit challenging the denial of the plate and accordingly has a strong interest in this Court's proper interpretation of the governing First Amendment principles.

Beginning in 2001, *Amicus* Illinois Choose Life, Inc. ("CLI"), gathered over 25,000 signatures from citizens wishing to display a "Choose Life" license plate. Its repeated efforts to persuade the Illinois General Assembly to approve the plate were rebuffed, however. CLI then filed suit. The federal district court ruled in favor of CLI, holding that the State's refusal to allow a "Choose Life" license plate constituted viewpoint discrimination. *See Choose Life Ill. v. White*, 2007 WL 178455 (N.D. Ill. 2007).

On appeal, the Seventh Circuit reversed. *See Choose Life Ill. v. White*, 547 F.3d 853 (7th Cir. 2008). It concluded that the specialty license plate forum was nonpublic, and (accepting an argument made by Illinois for the first time on appeal) that the Illinois legislature had excluded the entire "subject" of abortion. Based on that rationale, the Seventh Circuit panel held that Illinois had not engaged in impermissible viewpoint discrimination, but only in content-based discrimination, which the panel thought was reasonable and therefore permissible. *Id.* at 865. CLI petitioned for certiorari, but this Court declined to take the case. *Choose Life Ill. v. White*, 558 U.S. 816 (2009).

Amicus Choose Life America, Inc., has dedicated itself as a volunteer consultant to helping individuals and groups all across America to ensure that "Choose Life" license plates are issued in their states. The first effort by its founders began in 1996 in Florida. The Florida efforts were aimed at enabling license-plate

sales that in turn would help fund pre-natal care for women considering adoption services as well as other needed services offered by pro-life pregnancy centers and similar life-affirming agencies. The "Choose Life" plate was made available for sale in Florida on August 11, 2000. Since that time, interest has mushroomed in state after state. The "Choose Life" license plate is now available in 29 states and the District of Columbia. Over 950,000 plates have been sold or renewed, raising more than $21,000,000 for the causes of women's health, life, and adoption. Of the states that have not yet permitted a "Choose Life" plate, only five have no group currently working to obtain permission to issue the plates. In every other state, efforts are ongoing.

Amici desire to offer a "Choose Life" license plate to willing buyers in Illinois and Wisconsin as well as the other states where efforts to pass a bill have thus far been unsuccessful. In addition, *amici* are concerned for their First Amendment right (and the right of their members) to access the specialty license plate forum and express a message of life and hope. The expansion of the government speech doctrine would infringe not only on *amici's* rights but also on the rights of countless other groups and individuals in every state. Given *amici's* strong interest in the issues presented and their active participation in efforts to win permission of "Choose Life" plates (as well as litigation over the constitutionality of state efforts to suppress their expression of this viewpoint), *amici* suggest that this brief may be helpful to the Court.

SUMMARY OF ARGUMENT

Although automobile license plates "are still used for their original purpose of tracking individuals," they

have "over the years become a way for Americans, who spend an average of 56 minutes a day in their cars, to express their identity." Katherine Marsh, *License To Shill*, Legal Affairs, Jan/Feb. 2003, *50, *52. As such, specialty plates implicate the First Amendment.

By creating the specialty license plate scheme and allowing private groups to craft their own design and message, Texas has intentionally opened a venue for private speech. Although there is confusion in the lower courts regarding the proper means of classifying various fora, the forum here would appear to be a designated public forum because the State has opened it for use by the general public for expressive activity. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Judged by the legal standards applicable to designated public fora, the State's denial of Respondents' application for a specialty plate constituted impermissible viewpoint discrimination.

Amici also wish to highlight the dangers to the Free Speech Clause posed by an expansive interpretation of the government speech doctrine. Unless the government speech doctrine is carefully cabined by clearly defined limits, it poses a serious risk of harming the First Amendment rather than preserving the robust culture of free speech that is essential to a free society. With specialty license plates in particular, a blurring of the line separating government and private speech opens the way for legislatures to manipulate their plate approval schemes in order to squelch disfavored viewpoints. It also invites government domination of the marketplace of ideas, because more government speech almost always equals less private speech.

Finally, as illustrated by the facts in this case, misuse of the government speech doctrine lends itself to the imposition of a "heckler's veto" on controversial topics. *Amici* therefore urge this Court to reject the temptation to apply the government speech doctrine mechanically to the facts of this case, given the stark differences in the nature of the specialty license plate forum as compared to prior applications of government speech and the broad use of such plates to advance private expression.

ARGUMENT

I. Texas's Forum Inviting Specialty License Plates Custom-Designed by a Private Actor and Containing a Message Uniquely Crafted by the Private Actor Constitutes a Designated Public Forum for Speech.

A. The Custom-Designed Specialty Plates Implicate Private Speech.

Contrary to Petitioners' assertion (Pet. Br. 22-23), specialty plates under the Texas scheme that are designed and sponsored by a nonprofit organization[2] assuredly implicate private speech. Inviting private actors to custom-design a specialty plate for display on privately owned vehicles that contains the actors'

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[2] In fact, although the original rules stated that this option was available only to nonprofits, *see* Tex. Transp. Code § 504.801(b), in practice the Department now allows anyone to apply. *See* http://www.txdmv.gov/txdmv-forms/doc_download/674-how-to-propose-a-specialty-license-plate ("Anyone—including individuals, non-profit organizations, and for-profit entities—can propose a design to My Plates.") (last accessed February 9, 2015).

unique and specially crafted message is predominately if not entirely private speech, not government speech. Consequently, First Amendment protections should attach.

This Court long ago affirmed that speech on license plates sufficiently implicates private speech to warrant First Amendment protection. *See Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (State could not force citizens to bear state motto on license plates). The entire foundation for this Court's decision in *Wooley* was the assumption that individual speech was involved when individuals displayed a license plate on their private vehicles that contained a message beyond the identifying information of the license plate number. *Id.* at 714. If this principle is true where the government selects the message and only one message is available, *a fortiori* it is true where the government has allowed individuals the opportunity to create and select their own messages to be displayed on the plates.

The Texas scheme sets forth three different ways to create a specialty plate. *Texas Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388, 390 (5th Cir. 2014). First, the legislature may create and specifically authorize a plate.[3] *Id.* Second, anyone may create a

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[3] This case presents no occasion to decide whether a specialty plate that is specifically created and authorized by the legislature contains government speech if the State exercises near-absolute control over its design and message. *Cf. ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 372, 376 (6th Cir. 2006) (legislature passed an act specifically authorizing, creating, and issuing a "Choose Life" license plate; held, the plate constituted government speech, not private speech). That category of specialty plates is not at issue here.

specialty plate through a third-party vendor. *Id.* Third, the Department of Motor Vehicles Board ("the Board") may issue the plate, either on its own initiative or in response to an application by a nonprofit organization. *Id.* It is this third method that is at issue here: Respondents initiated the request for the plate at issue. *Id.*

Under this third option, when the plate is initiated by a nonprofit organization, the design is created by the nonprofit and every word of its message is crafted and overseen by that nonprofit. The finished product is then placed on the vehicles of private parties, who pay a premium for the privilege of displaying that particular message to thousands of passing motorists. Indeed, as Respondents point out, Resp. Br. at 7, ultimately it is only the owner of the vehicle who publishes the speech on a specialty plate; but for his decision to purchase and display the plate, no speech would occur. This fact pattern is clearly distinguishable from that in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), in which the promotional campaign was "from beginning to end the message established by the Federal Government." *Id.* at 560.[4] Not so here.

This case is also easily distinguishable from *Rust v. Sullivan*, 500 U.S. 173 (1990), which simply upheld restrictions placed on the use of federal funds within

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[4] In addition, as noted by the Ninth Circuit and Judge Martin in his dissenting opinion in *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 373 (6th Cir. 2006), *Johanns* is distinguishable because that case involved "a government-compelled subsidy of government speech," and specialty license plates involve neither a subsidy nor (arguably) government speech. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 964 (9th Cir. 2008) (citing *Bredesen*).

the narrow confines of a family planning initiative. The fact that the State here retains the right to review and approve the general design that appears on a plate produced within the State's specialty plate program does not and cannot transform the nonprofit's chosen message into government speech. Rather, it is more appropriately analogized to *Wooley*, in that even complete governmental control over the design and content of the message, when exercised in the context of license plates that individuals display on their personal property, still implicates the free speech rights of individuals. *See id.* at 715 (referring to license plates with mottos on them as requiring drivers to "use their private property as a 'mobile billboard' for the State's ideological message.").

In fact, Petitioners' argument proves too much. Under the State's theory, it may transmute any expression occurring on or in any government-owned property or government-run program into government speech simply by decreeing that the State retains veto power. Thus, public parks may be transformed from traditional public fora into nonpublic fora under the State's thumb; student speech occurring in government-owned public schools may be severely restricted merely by adoption of a policy imposing a government veto over it; and a city that purchases all the billboards in town could exert absolute control over all speech on them. In short, the State's theory would cripple the First Amendment.

After all, as the Fifth Circuit correctly observed, "states have not traditionally used license plates to convey a particular message to the public." *Vandergriff*, 759 F.3d at 394; *see also Wooley*, 430 U.S. at 716 (one

reason advanced by state for including motto on license plate was for identification purposes). And if the State does choose to convey a message to the public under Texas's scheme, it has a separate avenue to do so—under the first category of creating a specialty plate, whereby the legislature creates and specifically authorizes the plate. It defies logic to argue that the State has created separate avenues for specialty plates with one such avenue reserved for its exclusive use, and then chosen to bypass this direct and exclusive means of expressing itself in favor of an indirect system in which a nonprofit custom-designs a plate containing a message developed entirely by the nonprofit, and for which the purchaser pays a premium.[5]

At most, as the Fourth Circuit found, specialty plates constitute a mix of private speech and government speech. *See ACLU of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014) ("We have no hesitation in holding that the 'Choose Life' plate at issue here implicates private speech rights and cannot correctly be characterized as pure government speech."); *see also Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring in denial of rehearing en banc) ("speech in fact can be, at once, that of a private

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[5] Judge Smith is therefore mistaken when he asserts in his dissent that if the speech on specialty plates is private speech then "Texas may not speak on its license plates." *Vandergriff*, 759 F.3d at 408. In fact, Texas may speak whenever it desires, provided it uses the first means of creating a specialty plate, whereby the legislature devises the message and specifically authorizes the plate. Furthermore, the State has done just that in some 232 instances. *See* Resp. Br. at 2.

individual and the government," and speech on a specialty license plate may be the "quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable"). But even then, as the Fourth Circuit correctly held, private speech rights are sufficiently implicated to warrant First Amendment protection.

The speech appearing on a specialty license plate and displayed on a private vehicle is therefore much more strongly associated with the private speaker than speech on a monument, as was the case in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), and consequently should enjoy a greater degree of protection under the First Amendment.[6]

B. The Texas Scheme Creating a Category for Custom-Designed Specialty Plates Constitutes a Designated Public Forum.

1. There is confusion over the public forum doctrine.

There is continuing confusion among the lower courts regarding the public forum doctrine in the wake of *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) and *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010) (recognizing three types of forum, the

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[6] Judge Smith is therefore mistaken when he argues in dissent that *Summum* has already settled the question of how to deal with this kind of mixed speech; the distinctly different factual context of a monument as compared to a license plate means that it did not. *Vandergriff*, 759 F.3d at 408-09.

traditional, the designated, and the limited public forum). *See, e.g.*, *Galena v. Leone*, 638 F.3d 186, 197–98 nn.8-9 (3d Cir. 2011) ("There appears to be some inconsistency in federal courts' opinions, even those of the Supreme Court, as to whether a limited public forum is a separate category or a subset of a designated public forum with a third category of forums being 'nonpublic forums.'"); *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011) (stating that this Court "has broadly discerned *three* distinct (although not airtight) categories of government property for First Amendment purposes: traditional public fora, designated public fora, and limited public fora") (emphasis added).

In fact, the confusion over the public forum doctrine predates *Summum* and *Martinez*. *See, e.g., Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 969 (9th Cir. 2008) ("The designated and limited public forum classifications 'ha[ve] been the source of much confusion.'") (quoting *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001)).[7]

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[7] *See also Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128 (9th Cir. 2011) (recognizing *four* categories of fora); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012) (noting that the Court's use of the term "limited public forum" has been "inconsistent"); *Cyr v. Addison Rutland Supervisory Union*, 2014 U.S. Dist. LEXIS 141406 (D.Vt. Sept. 30, 2014) (describing limited public forum as "a subset of the designated public forum" and noting that strict scrutiny applies to "restrictions on speech that fall within the designated category for which the forum has been opened" (*quoting Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142, 143 (2d Cir. 2004), *citing Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002)); *NAACP v. City of Philadelphia*, 2014 U.S.

This Court's prior decisions have sometimes identified the limited public forum as a subset of the designated public forum and therefore subject to strict scrutiny. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992) ("The second category of public property is the designated public forum, whether of a limited or unlimited character—. . Regulation of such property is subject to the same limitations as that governing a traditional public forum.") (*citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 46 (1983)); *Cornelius v. NAACP Legal Def.& Educ. Fund, Inc.*, 474 U.S. 788, 802, 800 (1985) (limited public forum is subset of public forum; "speakers cannot be excluded without a compelling government interest"). More recently, however, the Court has deemed speech in a limited public forum worthy of no more protection than speech in a nonpublic forum. *See Martinez*, 561 U.S. at 679, n. 11 ("in [a limited public] forum, a governmental entity may impose restrictions on speech that are

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Dist. LEXIS 105239 (E.D. Penn. Aug. 4, 2014) (stating "it is unclear what categories of fora even exist"); *compare Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F.Supp. 2d 456, 469 (S.D.N.Y. 2012) ("In its First Amendment jurisprudence, the Supreme Court has classified government property into *three* general categories: traditional public forums, designated public forums, and nonpublic forums.") (emphasis added) *with Hassay v. Mayor & City Council of Ocean City*, 955 F.Supp. 2d 505, 518 n.12 (D.Md. 2013) ("For the purpose of analyzing restrictions of speech on public property, the Supreme Court has divided such property into [*four*] categories: the traditional public forum, the designated public forum, the limited public forum, and the non-public forum.") (emphasis added; citations omitted); *see generally* Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 106 (2008) (collecting cases).

reasonable and viewpoint-neutral") (*quoting Summum*, 555 U.S. at 470).

2. Texas has created a designated public forum here.

Here, Texas has intentionally created a forum for public discourse by instituting a specialty license plate scheme under which a nonprofit organization may custom-design its own plate and craft every word of the message contained on it. Moreover, the Board must approve only the overall *design*; it has no input into the specific content of the message. *Vandergriff*, 759 F.3d at 390;[8] *see also Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 966 (9th Cir. 2008) ("The Commission's de minimis editorial control over the plate design and color does not support a finding that the *messages* conveyed by the organization constitute government speech.") (emphasis in original). Furthermore, Texas requires a deposit of $8,000 before manufacturing on a new specialty plate begins, which is returned once 800 plates are sold. *See* http://www.txdmv.gov/motorists/license-plates/sponsoring-a-specialty-license-plate (last accessed Feb. 13, 2015). This would seem entirely unnecessary if the message were simply the government's speech all along.

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[8] The Board "may refuse to create a new specialty license plate *if the design might be offensive to any member of the public*." *Id.* (quoting Tex. Transp. Code Ann. § 504.801(c) (emphasis added)). The Fifth Circuit correctly determined that this vague "standard" impermissibly vested State officials with unbridled discretion which invites viewpoint discrimination. *Vandergriff*, 759 F.3d at 398-99.

The district court here found this third means of creating a specialty license plate to be a nonpublic forum, agreeing with the Fourth and Seventh Circuits. *Id.* at 391; *see also ACLU of N.C. v. Tata*, 742 F.3d 563 (4th Cir. 2014); *Choose Life, Ill. v. White*, 547 F.3d 853 (7th Cir. 2008). The Fifth Circuit chose not to address the issue of forum analysis. However, when carefully analyzed—and considering the State's intentional act of opening a forum for a wide diversity of specialty plates[9]— it appears that this forum is not a nonpublic forum at all, but a designated public forum.

In *Stanton*, the Ninth Circuit found that because "Arizona took the affirmative step by passing its special license plate legislation of allowing limited access to license plates publicly displayed for expressive conduct as vehicles are driven throughout the state," *id.* at 969, it had created a limited public forum. *Id.*

The best and most thorough analysis, however, was undertaken in *Sons of Confederate Veterans v. Holcomb*, 129 F. Supp. 2d 941, 947-49 (W.D. Va. 2001), *aff'd on other grounds*, 288 F.3d 610 (4th Cir. 2002).

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[9] According to the Fifth Circuit, Texas currently recognizes over 350 specialty plates. *Vandergriff*, 759 F.3d at 395. Among this broad diversity of topics are plates for numerous out-of-state universities such as Notre Dame, the University of Alabama, Brigham Young University, the University of Mississippi, and Boise State University. See http://www.txdmv.gov/motorists/license-plates/specialty-license-plates (last accessed Feb. 13, 2015). In addition, specialty plates are available for Remax real estate company, the YMCA, Texas Roadhouse restaurant, the Knights of Columbus, and various NASCAR drivers such as Jeff Gordon, Dale Earnhart, and Dale Earnhart, Jr. *Id.* It strains credulity to maintain that all these messages are the State's.

The *Holcomb* court first considered the government speech vs. private speech dichotomy, and concluded that some specialty plates regarding government matters, such as the state motto or the state bird, do in fact constitute government speech. 129 F. Supp. 2d at 944. However, "plates honoring various occupational associations, civic and fraternal associations, industry associations, and so forth all represent the views of private actors, who are entitled to First Amendment protection." *Id.*

The court then undertook a detailed analysis of the forum, applying *Cornelius*, 474 U.S. at 812 (1985), and concluded that it was a designated public forum. 129 F Supp. 2d at 947-48; *see also* Jeremy T. Berry, *Licensing A Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 Emory L.J. 1605, 1624-30 (2002) (arguing that specialty plate forum should be treated as designated public forum; "the 'Choose Life' plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate"); Jack Achiezer Guggenheim & Jed A. Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. Miami L. Rev. 563, 577-79 (2000) (specialty plates should be considered designated or limited public forum but vanity plates should be considered nonpublic forum). The same is true here.

Clarifying that a forum such as this one is a designated public forum will resolve the difficulties brought on both by the inconsistencies in applying forum doctrine and by lower courts wrestling with the

often unclear distinction between content-based and viewpoint-based discrimination in the context of a state's refusing to issue a specialty license plate. *Compare Stanton*, 515 F.3d 956, 972 (finding denial of "Choose Life" license plate to constitute impermissible viewpoint discrimination because of the limited public forum) *with Choose Life Ill. v. White*, 547 F.3d 853 (7th Cir. 2008) (finding denial of "Choose Life" license plate to constitute only content-based discrimination, which it deemed permissible because it occurred in a nonpublic forum).

II. Because Expansion of the Government-Speech Doctrine Entails a Corresponding Reduction in the Freedom of Private Speech, It Should be Extended Only with Great Caution.

"The government speech doctrine is 'recently minted,'" *Vandergriff*, 759 F.3d at 393 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring)), and "correspondingly imprecise." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting). As Justice Souter wrote after leaving the High Court, "the doctrine is still at an adolescent stage of imprecision." *Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (Souter, J.) (declining to undertake a government speech analysis). Further complicating the matter, this Court's most recent decisions addressing the doctrine, *Johanns* and *Summum*, were pluralities involving six (6) and five (5) different opinions, respectively, which examined unusual fact patterns and provided little practical guidance.

Not surprisingly, the doctrine has been ill understood and inconsistently applied. In the specialty

license plate arena alone it has been used to justify both government speech and private speech under very similar factual circumstances. *Compare ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (*Johanns* dictates that specialty license plates are government speech) *with Stanton*, 515 F.3d 956 (*Johanns* analysis is consistent with Fourth Circuit's four-part test developed in *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), therefore finding that Arizona specialty plates constitute private speech).

Unless the government speech doctrine is carefully constrained, it risks harming the First Amendment and diminishing rather than preserving and protecting fundamental rights of free speech. Absent clear and specific parameters, shrewd legislatures may retool their specialty plate schemes in a manner calculated to discriminate against disfavored viewpoints by the simple expedient of reserving final veto authority.

Further, absent adoption of explicit limits on the government speech doctrine, specialty license plate programs could turn government into a super-censor, because there appears to be no principled distinction between *specialty* plates, which permit customized messages requested by groups and organizations, and *vanity* plates, which permit customized messages requested by individuals. A government that permits an individual to order a "CHUZ LIF" vanity plate cannot rationally claim that the plate is transformed from private into government speech when a group of citizens request issuance of "CHOOSE LIFE" plates.

Amici suggest that the government speech doctrine should not be expanded any further. At a minimum,

however, any expansion of the doctrine in the context of specialty license plates should be limited to those situations where the legislature exercises a far greater degree of control and takes a more active role in selecting, designing, and approving every aspect of the specialty plate—and even then, as *Wooley* makes clear, there remains the individual speech right to refrain from carrying such a message. Merely reserving veto power over the final design and message while delegating administrative oversight over the vast majority of the process is simply not enough to transform private speech into government speech.

Outside the narrow confines of specialty license plates, the government speech doctrine has already been employed to give government officials extraordinary advantages in expressing a favored viewpoint to the detriment of those with an opposing viewpoint. Worse, government speech comes with the imprimatur of "official" approval, exclusive control of powerful channels of communication, and isolation from critical scrutiny in the marketplace of ideas.

Specifically, the doctrine has been employed to protect links on a government website to private groups supporting one side of a hotly contested issue of public concern, but not to the other side, *Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314 (2009) (selection of links to place on town website is government speech under *Summum*); to justify use of a public school website, e-mail, and other forms of communication to urge opposition to a legislative bill that proposed tax credits for private and home schooling, *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008) (finding that school distribution system was not public forum

and that campaign was government speech); to uphold the financing of government campaign propaganda with taxpayer dollars to defeat a citizen-sponsored ballot initiative against a new taxpayer-funded fire department, *Kidwell v. City of Union*, 462 F.3d 620, 626 (6th Cir. 2006) (2-1 decision) (stating that "[t]he needs of effective governance command that the bar *limiting* government speech be high" (emphasis added)); and to censor a valedictorian speech at a high school graduation ceremony, *e.g., Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009) (mandated prior review of content of student speech by school officials converted it into "school-sponsored" speech).

Notwithstanding the diminishment of free speech rights, the government speech doctrine may also work to further limit the free exercise of religion in the public square, given this Court's repeated admonition that "'government may not promote or affiliate itself with any religious doctrine or organization.'" *Summers v. Adams*, 669 F Supp. 2d 637, 639 (D.S.C. 2009) (quoting *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), and holding that "I Believe" license plate was government speech amounting to a state endorsement of religion in violation of the Establishment Clause).

In short, the government speech doctrine poses a risk of becoming the proverbial child who devoured her mother. Because the doctrine largely insulates one communication forum after another from public debate, "official" speech if given too broad a reading will necessarily drown out the expression of competing viewpoints and perspectives on the part of individuals.

Nor is this all. As this Court warned in the predecessor to *Johanns*: "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. " *United States v. United Foods*, 533 U.S. 405, 411 (2001). That is exactly what the government speech doctrine would do if expanded.

Whether or not citizens are compelled to pay special subsidies, government speech of a partisan nature poses a grave risk to the fundamental freedoms upon which this great nation was founded. Even when the government agrees with "our side" of a disputed issue, the effect of government occupation of larger areas of the debate on issues of public concern usually means smaller participation by private citizens and ultimately government domination of the debate.

It is axiomatic that the First Amendment is inapplicable to government speech; thus, as government speech on a contested issue increases, private speech must decrease proportionally. At the least, private citizens opposed to the government's position are placed at a decided disadvantage, because the government's resources and channels of communication dwarf those of the private citizen. As the government leviathan inexorably grows larger and larger, so too will the invocation of the government speech doctrine increase, causing a corresponding and inevitable decrease in the First Amendment rights of American citizens.

The Supreme Court of Oregon presciently cautioned almost 30 years ago: "[G]overnment propaganda for its chosen policies can be criticized for denying equal

chances to proponents of competing policies, or for 'drowning out' the free speech of opposing voices ." *Burt v. Blumenauer*, 699 P.2d 168, 299 Or. 55, 68 (Or. 1985) (internal citations omitted); *see also*, Randall Bezanson and William Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1502 (2001) ("If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain."). Indeed, whether or not the government's right to speak is rooted in the First Amendment (it is not), it threatens to loosen the First Amendment from its constitutional moorings.

CONCLUSION

For all of the foregoing reasons, this Court should find that the Texas specialty plate forum is a designated public forum, and that there is sufficient private speech at issue to warrant invocation of the First Amendment.

Respectfully submitted,

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JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF RESPONDENTS

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Pursuant to this Court's Rule 37.3, *amicus curiae* Foundation for Individual Rights in Education (FIRE) respectfully files this brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Amicus FIRE is a national nonpartisan, 501(c)(3) nonprofit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's institutions of higher education to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student and faculty rights on campus. During its more than 15 years of existence, FIRE has advocated on behalf of the fundamental liberties of students and faculty on campuses nationwide.

Although the link between specialty license plates and college campuses may not be intuitive, the implications of this case for free expression in academia are potentially enormous. FIRE is concerned that by broadening "government speech" to include messages and images on state-issued specialty license plates, this Court would

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1. The parties have globally consented to the filing of *amicus* briefs in this case and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* FIRE hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* contributed monetarily to the preparation or submission of this brief.

inadvertently create another mechanism for censoring student and faculty speech and undermine the role of the public university as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

SUMMARY OF ARGUMENT

If the Court reverses the decision of the United States Court of Appeals for the Fifth Circuit and holds that the messages and images that appear on state-issued specialty license plates are government speech, public college administrators nationwide will exploit the ruling as a new opportunity to further restrict protected expression on campus. Should this Court decide that specialty license plates are government speech because state officials are involved in the production process, college and university administrators will soon claim student and faculty expression that involves university procedures is likewise "government speech" that they have the power to control and censor.

Despite this Court's repeated recognition of the crucial importance of free speech on public college campuses, censorship of student and faculty speech is endemic. In FIRE's experience, college administrators often exploit perceived ambiguities in the law in an attempt to justify restrictions on faculty and student speech. Many colleges already wield dubious claims of trademark infringement against students and faculty in order to curtail speech that is controversial or critical of the institution, alleging that such speech will be mistaken for institutional speech—a contention that touches upon the core issue in this case.

In FIRE's experience, university administrators closely monitor impending legal developments that might empower them to enact additional restrictions on student speech. In fact, FIRE is aware that at least one university is awaiting the outcome of this case to support its argument in federal district court that a student organization's T-shirts amount to institutional speech and may thus be censored without violating the First Amendment. In denying the university's motion to dismiss, the judge stated that the university's argument could not provide a legal basis to dismiss the case at present but that the issue was undecided and this case was before the Court.

The impact on campus of this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), demonstrates the negative effect seemingly unrelated First Amendment cases can have on the rights of public college students and faculty. When this Court left open the possibility that its holding in *Garcetti* was applicable to the scholarship and teaching of public university professors, universities immediately began to argue—with success in some circuits—that such speech was unprotected, to the continuing detriment of academic freedom on campus. Absent an explicit holding that the speech of students and faculty on public university campuses is presumptively private speech, a holding for Petitioners would do similar damage to freedom of expression.

Amicus FIRE respectfully submits that this Court should uphold the Fifth Circuit's judgment and deny would-be censors at our nation's public colleges a new means of silencing campus speech. Based on our more than 15 years of experience defending the expressive rights

of college students and faculty, FIRE has no doubt that an ambiguous decision in this case would have a harmful effect on campus discourse. A clear resolution in favor of Respondents would ensure that student and faculty speech remains free as presumptively private expression and thus not subject to administrative review and approval.

In the alternative, FIRE asks this Court to consider the profound impact that an expansion of the government speech doctrine will have on the free speech rights of students and faculty at our nation's public colleges and universities, where free speech—despite its critical importance—is under near-constant attack. If this Court does reverse the Fifth Circuit, it should do so only narrowly and only with a clear statement affirming that public university student and faculty expression remains presumptively private expression.

ARGUMENT

I. A Decision That Specialty License Plates Constitute Government Speech Will Harm Free Speech on Public College Campuses.

The import of this case extends far beyond specialty license plates. Because public college and university administrators routinely seek to censor student and faculty speech, this Court's jurisprudence concerning the boundaries of government speech sharply impacts the First Amendment rights possessed by students and faculty on our nation's public campuses. This Court has repeatedly made clear that the First Amendment's protections do not end at the campus gate—and, indeed, that the First Amendment is of unique value at public

institutions of higher learning. Accordingly, any decision that expands the range of speech under governmental control should make an explicit exception for the freedom of expression and academic freedom rights possessed by students and faculty members at public universities.

A. Although Freedom of Expression Is of Particular Importance on Public College and University Campuses, Censorship There Is Endemic.

This Court has long emphasized and understood the importance of free and open expression on our nation's public campuses, proclaiming more than a half-century ago that the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the nearly sixty years since *Sweezy*, this Court and lower courts have repeatedly reaffirmed the particular significance of the First Amendment in the public university setting.[2]

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2. *See, e.g., Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010) ("The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish."); *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) ("The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection.").

In *Healy v. James*, 408 U.S. 169 (1972), for example, this Court made clear that

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Healy, 408 U.S. at 180 (internal citations omitted). *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting that when regulating speech on campus, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").

But despite repeated affirmation of the critical necessity of free speech on campus by this Court and lower courts, the majority of public colleges nationwide maintain "speech codes"—restrictions on student and faculty speech that heavily regulate or prohibit speech protected by the First Amendment.[3] Public university

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3. FIRE surveyed 437 colleges and universities in 2014 and found that more than 55 percent maintain policies that clearly and substantially prohibit protected speech. In 2014, FIRE launched an aggressive campaign to support students and faculty who want to challenge these rules in court. There is no shortage of potential cases: In the campaign's first year, seven cases were filed—four on the same day. Jennifer Medina, *Advocacy Group Sues 4 Universities in Challenge to Policies It Says Curb Free Speech*, N.Y. TIMES, July 1, 2014, at A18.

administrators all too often use these speech codes to limit or prohibit student speech they deem offensive or find politically inconvenient.[4] Also, unfortunately, FIRE's years of experience defending expressive rights on campus demonstrate that administrators will seize upon any remotely related legal justification to limit controversial, dissenting, or merely inconvenient discourse.

B. Public Colleges Routinely Attempt to Establish Policies and Procedures Under Which They Can Censor Student or Faculty Speech.

Colleges and universities frequently establish policies and procedures based on distortions of existing legal doctrines to silence speech. For example, this Court has allowed government actors to enact "reasonable," "narrowly tailored" time, place, and manner regulations on speech on government property. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Countless universities have erroneously cited this carefully prescribed allowance to justify policies that both require students to navigate cumbersome administrative procedures to obtain permission to express their views on campus and quarantine students' expressive activities to small and/or remote areas of campus.[5] The University

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4. For extensive examples of such abuses of power, *see* GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

5. *See Infographic: Free Speech Zones on America's Campuses*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Sept. 19, 2013), http://www.thefire.org/wp-content/uploads/2014/03/Free-speech-zone-infographic-pdf.pdf (surveying more than 400 universities and finding that approximately 1 in 6 maintained a

of Cincinnati, for example, maintained a policy limiting expressive activities to a "free speech zone" comprising less than 0.1 percent of the university's campus and requiring 10 days' prior approval even for expressive activities in that zone. The university vigorously defended that policy against criticism until, in 2012, the U.S. District Court for the Southern District of Ohio ruled that the policy "violates the First Amendment and cannot stand." *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, No. 12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *2 (S.D. Ohio June 12, 2012).

Although trademark licensing is seemingly unrelated to censorship, public colleges and universities similarly attempt to regulate student or faculty speech by asserting untenably broad control over campus expression that references the institution's name or trademarks.[6]

"free speech zone" policy). *See also Burch v. Univ. of Haw. Sys.*, No. 14-cv-00200 (D. Haw.) (free speech zone policy revised in settlement agreement); *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-CV-05104 (C.D. Cal.) (same); *Van Tuinen v. Yosemite Comm. Coll. Dist.*, No. 13-CV-01630 (E.D. Cal.) (same)

6. *See, e.g., Adam Kissel, Berkeley Claims Control of the Word 'California' But Permits Student Group to Use It*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (May 3, 2010), http://tinyurl.com/Berkeley-Claims-Control (describing the University of California, Berkeley's prohibition on use of "California," "Cal," and "Berkeley" in student organization names without prior permission); *Free Speech Chilled at Santa Rosa Junior College: Administration Threatens Those Who Use Its Initials in Private E-mail Addresses and Domain Names*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (July 20, 2009), http://tinyurl.com/Santa-Rosa-Junior-College (describing Santa Rosa Junior College's ongoing ban of the college's name or initials in private email addresses or domain

Universities often grant use of their marks to student groups funded by activity fees and operating under the institution's auspices and supervision within the framework of student life programs.[7] Similar to regimes governing the authorization of specialty license plates, public colleges and universities often require students to gain approval before engaging in certain forms of expression that include the institution's marks—which can include not only mascots or logos, but the name of the institution itself.

Although they have the right to license their marks, colleges and universities routinely stretch that authority to control the students' message by claiming that the use of the trademark could be misinterpreted as the institution's support for the students' views. The fear that the message of an independent group could be misconstrued as institutional speech is dubious in light of this Court's precedents.[8] *See Rosenberger v. Rector*

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names). *See also St. Louis Univ. v. Meyer*, 625 F. Supp. 2d 827 (E.D. Mo. 2008) (adjudicating university's trademark suit against professor for incorporating a nonprofit corporation bearing the name and caption of the student newspaper in anticipation of its becoming an independent entity).

7. *See, e.g.*, Trademark Licensing: Student Groups, W. VA. UNIV., http://trademarklicensing.ur.wvu.edu/student-groups (last visited Feb. 12, 2015) ("Student organizations are permitted to use the WVU trademarks as approved by the WVU Office of Trademark Licensing to promote their student organization through student organization websites, on licensed apparel, in advertising, etc.").

8. Luke Darby, *Chancellor of Patrick Henry College Withdraws Short-Lived Threat to Sue Student-Run Gay Blog*, N.Y. MAG. DAILY INTELLIGENCER (Dec. 3, 2012), http://nymag.

and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (stating that "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers [including students]"); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). Nevertheless, FIRE knows of at least two cases currently pending in federal courts in which universities are justifying censorship on precisely that ground. For example, in a case currently being litigated in the Northern District of Illinois, Chicago State University (CSU) alleged trademark infringement in an attempt to shut down a faculty-authored blog that exposed mismanagement by the president and other senior administrators. CSU's General Counsel sent the faculty members a cease-and-desist letter claiming that the blog's masthead, which features a photo of three bushes trimmed into the shape of a C, S, and U, violated the university's

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com/daily/intelligencer/2012/12/patrick-henry-gay-queer-farris.html (describing Patrick Henry College's threat of a trademark infringement lawsuit against the student-run "Queer Patrick Henry College" blog, and the demand that any further discussion of LGBT issues be conducted "without using the term 'Patrick Henry College' in any manner"); *Online Speech Threatened at UCLA and Santa Rosa Junior College*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Aug. 20, 2009), http://tinyurl.com/Online-Speech-Threatened-UCLA (describing the University of California, Los Angeles' demand that a student take down a blog critical of the university based on claims of trademark infringement due to the use of the initials "UCLA" in its web address); *Victory for Free Speech at UC Santa Barbara*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Feb. 4, 2005), http://tinyurl.com/Free-Speech-UC-Santa-Barbara (detailing University of California, Santa Barbara's demand that a student take down a blog critical of the university due to its use of the initials "UCSB" in its web address).

trademark. *Beverly v. Watson*, No. 14-cv-04970 (N.D. Ill., filed July 1, 2014). Although the blog sharply criticizes CSU, the university claimed that the faculty use of the university's name or logo could be seen as university speech or as an endorsement of the message.[9] In addition, Iowa State University censored student organization T-shirts advocating marijuana legalization through its trademark policies, resulting in a First Amendment lawsuit currently pending in the Southern District of Iowa, described in detail on pages 14-15 of this brief. *Gerlich v. Leath*, No. 14-00264 (S.D. Iowa, filed July 1, 2014).

Thus, there is a strong parallel between the approval system used by universities and the specialty license plate approval system at issue in this case. Just as Petitioners argue that the "content and design of state-issued license plates" should be under State control, Pet'rs' Opening Br. at 13, so too do public college administrators routinely claim that student and faculty expression involving university marks or the institution's name should be subject to governmental approval. Just as Petitioners here claim the right to disassociate themselves from any message related to the Confederate battle flag on state license plates, Pet'rs' Opening Br. at 25–27, college administrators have attempted to justify banning controversial messages by asserting the right to control their name and marks.

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9. *See* Letter from Ari Cohn to Chicago State University President Wayne D. Watson, Mar. 4, 2014, *available at* http://www.thefire.org/fire-letter-to-chicago-state-university (describing Chicago State University's attempt to shut down a faculty blog critical of the administration based on claims of trademark infringement for its use of the initials "CSU" and a picture of a campus landmark, as well as alleged violations of university civility policies).

The majority of the courts below have crafted a rule for determining if specialty plates should be considered government speech or not: whether a reasonable person would be able to correctly identify the speaker as the government or a private party. *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *see also Choose Life of Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). This rule would fit well into the academic context. Just as a reasonable person would not mistake the dozens of messages sponsored by independent organizations on license plates for government speech, it is unlikely that a person seeing a student wearing a T-shirt advertising his or her college's chapter of the College Democrats or the College Republicans would mistake it as a message from the university.[10]

If this Court were to reverse the Fifth Circuit, however, the result would be a blow to free expression

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10. This Court has drawn a clear distinction between private speech and institutional government speech in previous holdings concerning public universities. In *Southworth*, this Court found that a public college's administration of student activity fee funding "does not raise the issue of . . . the state-controlled University's right, to use its own funds to advance a particular message" because "[t]he University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229. Likewise, in *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981), this Court observed that "by creating a forum," a public university "does not thereby endorse or promote any of the particular ideas aired there." But despite its clarity, this Court's precedent has not deterred administrators from asserting that private student or faculty speech is government speech.

on campus. By holding that messages created through a government approval process are government speech, this Court would create a vehicle for public university administrators to suppress controversial messages, claiming their control over the institution's trademarks is analogous to state license plate approval and thus gives them the right to censor any message that they do not like.

In sum, FIRE has seen a wide range of legal doctrines used to suppress speech on campus—and thus we have every reason to believe that a decision declaring specialty license plates to be government speech would be likewise used to stifle expression.

C. Universities Monitor and Exploit Legal Developments That Could Justify Greater Censorship on Campus.

In FIRE's experience, university administrators monitor legal developments that might empower them to place additional limitations on student and faculty speech. For example, on June 20, 2005, the Seventh Circuit issued an opinion applying the framework from this Court's analysis in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), allowing a high school principal to exert editorial control over a student newspaper, to a collegiate student newspaper. *Hosty v. Carter*, 412 F. 3d 731 (7th Cir. 2005). Just ten days later, the general counsel of the California State University System issued a memorandum noting the decision's potential impact on CSU institutions:

> [T]he case appears to signal that CSU campuses may have more latitude than previously believed

> to censor the content of subsidized student newspapers . . .[11]

Similarly, just one month after this Court issued its decision in *Morse v. Frederick*, 551 U.S. 393 (2007), Temple University relied heavily on that decision to argue for the constitutionality of its sexual harassment policy in an appeal to the Third Circuit. Temple's brief argued that "[a]t the time the district court made its ruling, it did not have the benefit of the *Morse* opinion in which the Supreme Court provided lower courts with guidance on how to analyze school policies that purportedly regulate student conduct."[12] Thus the university seized upon a high school case involving a nonsensical phrase—"BONG HiTS 4 JESUS"—that may have advocated illegal drug use to justify an overly broad and vague sexual harassment policy designed to regulate the speech of adult college students.

Indeed, FIRE is aware that at least one university is watching this specific case with an eye towards its impact on the institution's ability to limit students' free speech rights on campus. With *amicus* FIRE's support, two students from the Iowa State University (ISU) chapter of the National Organization for the Reform of Marijuana Laws (NORML) sued ISU for violating their First Amendment rights by refusing to approve

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11. Evan Mayor, *Memo linking California with* Hosty *decision worries students*, Student Press Law Ctr. (Sept. 15, 2005, 12:00 AM), http://www.splc.org/article/2005/09/memo-linking-california-with-hosty-decision-worries-students.

12. Brief of Appellant at 36, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

T-shirt designs that featured a cannabis leaf—although the university had no such scruples when it allowed the student BDSM group "Cuffs" to use the ISU initials. *Gerlich v. Leath*, No. 14-00264 (S.D. Iowa, filed July 1, 2014). ISU moved to dismiss the case, arguing in part that the T-shirts constituted government speech because the group's name—NORML ISU—referenced the university and was included in the design. (Per university policy, recognized student organizations like NORML ISU are required to include "ISU" in their name.) In denying the motion to dismiss, the judge stated that ISU's argument that the T-shirt design was government speech could not provide a legal basis to dismiss the case at this time. However, there was extensive discussion of the analogy of specialty license plate cases during the hearing on the motion, and the judge's order implied that the outcome of the *Confederate Veterans* case could be relevant in later stages of the case. Order Den. Mot. to Dismiss, *Gerlich v. Leath*, No. 4:14-cv-00264–JEG at n.3 (S.D. Iowa Jan. 6, 2015), ECF No. 26.

II. Even If This Court Does Reverse the Fifth Circuit, It Should Make Clear That Student and Faculty Expression on Public College and University Campuses Is Presumptively Private Speech.

If this Court does reverse the Fifth Circuit, it should do so only in a way that draws the boundaries of the government speech doctrine narrowly, and it should recognize the impact of its holding on campus discourse by explicitly clarifying that the speech of students and faculty at public colleges and universities remains presumptively private speech.

The need for such clarification is illustrated by the continuing uncertainty over the applicability of this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to the speech of faculty at public colleges and universities, and the attendant negative impact on academic freedom.[13] Since this Court explicitly declined to decide whether its *Garcetti* analysis "would apply in the same manner to a case involving speech related to scholarship or teaching," the decision has created considerable confusion at universities and in the lower courts.[14]

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13. *See generally* Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677 (2014); Hilary Habib, Note, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDIS. L.J. 509 (2013); Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1 (2013); Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs After Garcetti v. Ceballos?*, 40 CAP. U.L. REV. 265 (2012); Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the Garcetti Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 945 (2012).

14. *See Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) ("*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (declining to apply *Garcetti* to academic speech submitted as part of a professor's application for a full tenure professorship). *But see Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012) (expressing skepticism of any exception to *Garcetti* for academic speech); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (dismissing the First Amendment claims of a professor who complained of difficulties in administering a grant, because "the proper administration of an educational grant fell within the scope of Renken's teaching duties").

Not surprisingly, universities frequently ask courts to apply *Garcetti* to faculty speech and expression. In *Adams v. Trustees of the University of North Carolina-Wilmington*, the university defendants argued, on a motion for summary judgment, that *Garcetti* precluded a public university professor's First Amendment claim that the university had retaliated against him for his outspoken conservative, Christian writings. The university, noting "the majority [of this Court] refused to exclude university faculty from the scope of *Garcetti*," argued that *Garcetti* "bars plaintiff's First Amendment claims." Mem. in Supp. of Mot. for Summ. J. for Defs. at 26, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, No. 07-CV-64-H (E.D.N.C. May 1, 2009), ECF No. 132.[15]

Similarly, in 2008, Professor Loretta Capeheart brought a First Amendment retaliation claim against officials at Northeastern Illinois University, arguing that the university took adverse action against her because of her advocacy on behalf of students arrested at a political protest as well as her comments about the low number of Latino faculty at the university. The university argued that under *Garcetti*, the First Amendment did not protect Capeheart's expression. Mem. in Supp. of Mot. for Summ. J. for Defs. at 8, *Capeheart v. Hahs et al.*, No. 08-cv-1423 (N.D. Ill. Sept. 8, 2010), ECF No. 136.

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15. While the district court agreed with the university's argument, the United States Court of Appeals for the Fourth Circuit rejected it on appeal. *Adams*, 640 F.3d at 564 (observing that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment").

Just as this uncertainty continues to inhibit the creation of knowledge and free exchange of ideas on college campuses across the country, a reversal of the Fifth Circuit's decision without a clarification that the speech of student organizations (and other students and faculty) is not government speech will almost inevitably be used by universities to stifle freedom of expression on campus.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondents' briefs, the Fifth Circuit's judgment should be upheld.

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In the Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,
Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Fifth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae* in cases involving the First Amendment, including *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). Co-counsel Deborah Dewart is the author of a book, *Death of a Christian Nation*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The power and machinery of government should never be used to stifle private expression or distort debate in the "marketplace of ideas." The government speech doctrine is a developing concept that should be

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

thoughtfully restrained so that it never squelches the First Amendment rights of private citizens. At the same time, the government must "speak," allocate scarce resources, and develop public policies in order to serve the people it governs. That cannot happen without necessarily promoting some viewpoints and discouraging others.

License plates are perhaps "the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) ("*SCV II*") (Luttig, J., concurring). This case is thus an excellent vehicle for this Court to reexamine and clarify the emerging government speech doctrine. In this context, where government and private speech intersect, courts have wrestled with the character of the speech. Most courts have employed a four-factor test, borrowed the "reasonable observer" inquiry from Establishment Clause jurisprudence, or combined the two analytical approaches, in order to classify the speech. Results are widely divergent, confusing, and even contradictory. The tests have proved unworkable and highly subjective.

Different statutory schemes yield different conclusions as to whether the license plates are government or private speech. It is possible—and entirely constitutional—for a state to adopt a scheme where the government remains the primary speaker. And it is equally possible to open a limited forum for private organizations or citizens to express themselves. Clarity is needed so that states may craft appropriate programs with knowledge of the constitutional consequences.

ARGUMENT

I. THIS COURT SHOULD CRAFT A TEST THAT PROTECTS FREE EXPRESSION WITHOUT CRIPPLING THE ABILITY OF GOVERNMENT TO FUNCTION AND IMPLEMENT PUBLIC POLICIES.

America is a nation governed by consent of the people. The people elect officials to set and implement public policy. Some overlap between the government's speech and private speech is inevitable, raising constitutional concerns and "present[ing] heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace." R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001). A workable test should be crafted that will properly respect and apply the First Amendment. That test should avoid suppression of protected private speech, including the voices of those who disagree with current government policies. But it must also avoid drowning the voice of "the people," as expressed through their duly elected representatives.

A. The Government May Adopt Policies And "Speak."

This Court's precedents confirm that the government may adopt policies, endorse certain views, and "speak" for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009) ("*Summum*"); *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) ("*Southworth*"); *Nat'l Endowment for Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very

business of government to favor and disfavor points of view"). The government could hardly function without this freedom. *Summum*, 555 U.S. at 468. The government's ability to speak is not only a necessity, but is rooted in its political accountability to the electorate. *Southworth*, 529 U.S. at 235.

The government may also selectively fund activities it believes to be in the public interest, even though alternative goals are necessarily discouraged. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (government may allocate funds to favor childbirth and discourage abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (same); *Rust v. Sullivan*, 500 U.S. 173, 192-193 (1991) (same). A state may use specialty license plates to raise revenue for restricted purposes. *See, e.g., ACLU v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006) ("*Bredesen*") ("The Act strictly regulates the precise activities that these profits shall fund.")

B. The First Amendment Is Prohibitory —Not Mandatory.

The Free Speech Clause demands that the government not abridge freedom of speech. It does not require that government associate itself with *every* private message in *every* conceivable context. A mandate that every specialty license plate program encompass all viewpoints—regardless of its legal parameters—would discourage these programs and encourage states to return to a system of randomly assigned plates. The end result is less speech, not more.

If the state is considered the primary speaker, some viewpoints will not be represented. But those speakers

have a myriad of other ways to speak. Pet. Br. 11-12; *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388, 407 (5th Cir. 2014) (Smith, J., dissenting) ("*Vandergriff*") ("license plate frames, bumper stickers, window stickers, window flags, or even painting cars with the Confederate flag"); *Perry v. McDonald*, 280 F.3d 159, 169-170 (2d Cir. 2001) (bumper stickers); *SCV II*, 305 F.3d at 250 (Niemeyer, J., dissenting) ("Those who wish to display the Confederate Flag logo, even on their motor vehicles, remain free to do so.") The *only* place where SCV cannot display its message is "on the state-owned, state-issued license plate." *Id.* at 252 (Gregory, J., dissenting). In *Summum*, the City's rejection of Summum's monument did not "disproportionately restrict [its] freedom of expression" because the group could still engage in traditional modes of speech in the park. *Summum*, 555 U.S. at 494 (Breyer, J., concurring). Even more than public parks, license plates "do not serve speech-related interests alone." *Id.*

The state manufactures license plates, retains ownership, and places its name on them. The private speakers' agreement with the message does not trump the state's role:

> The fact that the licensee also speaks by choosing to display a customized but authorized version of the license plate does not change the fact that the license plate itself was the issue of the State and therefore constitutes government speech.

SCV II, 305 F.3d at 251 (Niemeyer, J., dissenting).

C. The Nature Of The License Plate Program Warrants Judicial Restraint In Mandating An Open Forum.

License plates are not a place where people gather to exchange ideas. The scope of possible speech is very limited. *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 2013 U.S. Dist. LEXIS 52785, *47 (W.D. Tex. 2013). The plates are small pieces of government-owned property designed to identify vehicles, often through random letter-number combinations.

In recent years, innovative programs have introduced a limited means of expression—sometimes to communicate state policies, sometimes a combination of voices, and other times the vehicle owner's expression alone. But "the public forum doctrine should not be extended in a mechanical way to the very different context of [license plates]." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000) ("*Knights*"), quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998) (public broadcasting). *See also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) (goal of public airport terminal is "facilitation passenger air travel," not "the promotion of expression"); *Wells v. City & County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001) ("*Wells*") (City presenting holiday message is not constitutionally obligated to incorporate "the message of any private party with something to say"); *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013 (9th Cir. 2000) (same—public school bulletin board); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (internet terminals and book collections at

public library); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (government acted as patron rather than sovereign in awarding grants to support the arts). Not every context for government speech automatically morphs into a public forum.

D. *Wooley* Does Not Alter The Result.

The Fifth Circuit erroneously concluded that this Court presumed "the license plates were private speech" in *Wooley v. Maynard*, 430 U.S. 705 (1977) ("*Wooley*"). *Vandergriff*, 759 F.3d at 395. On the contrary, *Wooley* addresses the "First Amendment right to avoid becoming the courier" for "the *State's* ideological message" by using one's personal vehicle as a "mobile billboard." *Wooley*, 430 U.S. at 715, 717 (emphasis added). The First Amendment guards the right "to decline to foster" "religious, political, and ideological causes." *Id.* at 714; *see also Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005). This freedom of thought applies whether the speech originates with the government or a private source.

The Sixth and Ninth Circuits correctly parse important aspects of *Wooley*. *Bredesen* distinguished it from schemes that offer choices among state-approved plates:

> The evil in *Wooley* was that the automobile owners were compelled to disseminate the message; here automobile owners are not only not compelled, they have to pay extra to disseminate the message.

Bredesen, 441 F.3d at 378. *Arizona Life Coalition* observes that the "private property" at issue in *Wooley* was the automobile rather than the state-owned plate

bearing the *state's* message. *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 967 n. 6 (9th Cir. 2008) ("*Stanton*") ("We have no doubt that New Hampshire's motto, 'Live Free or Die,' constitutes government speech.").

The program approved by Texas (and other states) avoids the compelled speech challenge in *Wooley*, where only one message was available. Vehicle owners may select from among a variety of state-approved messages. The compelled speech doctrine is not at issue.

II. TESTS EMPLOYED BY COURTS IN PRIOR CASES SUPPORT THE STATE'S POSITION—BUT ARE GENERALLY CONFUSING AND UNWORKABLE.

Several circuit courts have utilized a four-factor test to analyze cases that implicate both public and private speech, in license plate cases and other contexts: *Knights*, 203 F.3d at 1093-1094 (sponsorship identifications on radio broadcasts); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) ("*SCV I*") (license plates); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004) ("*Rose*") (license plates); *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008) (legislative invocations); *Roach v. Stouffer*, 560 F.3d 860, 867-868 (8th Cir. 2009) ("*Roach*") (license plates); *Stanton*, 515 F.3d at 965 (9th Cir. 2008) (license plates); *Wells*, 257 F.3d at 1139 (city-sponsored holiday display).

This Court has not considered the four-factor test, and there is a question about its viability following *Johanns*, which emphasized the government's broad control over the message rather than weighing (or counting) factors. The Sixth Circuit found the test in tension with *Johanns*. *Bredesen*, 441 F.3d at 380 ("*Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes.") The Fourth Circuit reasoned that *Johanns* merely "distilled" the four factors by focusing on "the government's *establishment* of the message" and its "*effective control* over the content and dissemination of the message." *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008), citing *Johanns*, 544 U.S. at 560-562. Similarly, the Ninth Circuit concluded that "the [*Johanns*] Court relied on factors similar to those set forth in the four-factor test." *Stanton*, 515 F.3d at 965. The Fourth Circuit recently reaffirmed the test, although describing the factors as "instructive but neither exhaustive nor always uniformly applicable." *ACLU of N.C. v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014) ("*Tata*").

The Seventh Circuit travels yet another avenue, concluding that "[the] multi-factor test can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Choose Life of Ill., Inc., v. White*, 547 F.3d 853, 865 (7th Cir. 2008) ("*CLI*"). To answer that question, the Court proposed three inquiries reminiscent of the four-factor test: "the degree to which the message originates with the government, the degree to which the government exercises editorial

control over the message, and whether the government or a private party communicates the message." *Id.*

Numerous courts have analyzed license plate schemes using the four-factor test and/or the "reasonable observer" inquiry. They have reached a wide array of conclusions—sometimes on similar facts and other times because of relevant distinctions.

A. Vehicle Identification—Not Expression—Is The Primary Purpose For License Plates.

The four-factor test originated with *Knights*, 203 F.3d 1085, a case involving federally-mandated sponsorship identifications. The "central purpose" of that program was "not to promote the views of the donors" but rather to acknowledge their contributions to the station. *Id.* at 1093.

License plate programs serve a wide range of purposes. Some cases identify government interests:

- *Rose*, 361 F.3d at 793 ("the Act's purpose is to promote the State's preference for the pro-life position")
- *CLI*, 547 F.3d at 865 ("primary purpose is to identify the vehicle, not to facilitate the free exchange of ideas")

Other cases list raising revenue and/or expression:

- *SCV I*, 288 F.3d at 619 ("produce revenue while allowing...for the private expression of various views")
- *Stanton*, 515 F.3d at 966 (raise revenue)

- *Roach v. Stouffer*, 560 F.3d at 867 ("to allow private organizations to promote their messages and raise money and to allow private individuals to support [them]")
- *Tata*, 742 F.3d at 572 ("to allow North Carolina drivers to express their affinity for various special interests, as well as to raise revenue for the state")

In *Johanns*, the program at issue implemented a "federal policy of promoting the marketing and consumption of beef and beef products, using funds raised by an assessment." *Johanns*, 544 U.S. at 553.

Free expression is more likely the purpose of a personalized "vanity" license plate scheme where an individual selects a unique combination of letters and numbers. *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) ("to give vent to the personality, and reveal the character or views of the plate's holder"). But even here, it is not a foregone conclusion: "Automobile license plates are governmental property intended primarily to serve a governmental purpose, and inevitably they will be associated with the state that issues them." *Perry v. McDonald*, 280 F.3d at 169 (vanity program could exclude scatological terms).

B. The State Maintains Editorial Control.

This Court highlighted government control in *Johanns* and *Summum*. In *Summum*, the City exercised "final approval authority" in selecting monuments for display in the park, using set criteria. *Summum*, 555 U.S. at 473. In *Johanns*, the government established the message and exercised final approval over every word. *Johanns*, 544 U.S. at

560-562. The government speech doctrine applied even though private sources assisted in developing specific messages. *Id.* This principle has been applied to license plates. *Roach v. Stouffer*, 560 F.3d at 864-867 ("both the state and the sponsoring organization exercise some degree of editorial control"); *Bredesen*, 441 F.3d at 378 (volunteers choose to display state-approved messages on license plates).

Government control over license plates is ordinarily evident from the relevant statute(s). This factor often weighs in favor of the state:

- *Rose*, 361 F.3d at 793 (state retained complete editorial control—this factor weighed in its favor)
- *Bredesen*, 441 F.3d at 375 ("government determines an overarching message and retains power to approve every word disseminated")
- *Tata*, 742 F.3d at 573 ("editorial control...weighs in favor of the government")

The Fourth Circuit (*Rose* and *Tata*) nevertheless ruled against the state, while the Sixth Circuit (*Bredesen*) found the plates were government speech.

The Fourth Circuit minimized the importance of state control in an earlier case. *SCV I*, 288 F.3d 610, 621 ("little, if any, [government] control ordinarily is exercised"). The Fifth Circuit, similarly, insisted this Court "did not espouse a myopic control test in *Johanns*." *Vandergriff*, 759 F.3d at 394, citing *Tata*, 742 F.3d at 570.

In another SCV license plate case, Judge Niemeyer explained that "[t]he State has manifested its complete control over license plates, even dictating modifications, alterations, and special language or numbers that it will accept." *SCV II*, 305 F.3d at 249-250 (Niemeyer, J., dissenting). Similarly, Judge Smith described the state's ultimate control in the Texas scheme:

> Texas invites private groups or persons to submit license-plate designs for consideration, but the state ultimately chooses what designs it wishes to adopt and which plates it wishes to manufacture for sale.

Vandergriff, 759 F.3d at 405 (Smith, J., dissenting).

In other contexts, the government exercises an editorial function without incurring a constitutional obligation to open a public forum: *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (public television broadcaster had discretion to exclude independent congressional candidate from televised debate); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (library exercises discretion in selecting books); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (government acted as patron and exercised discretion in awarding grants to support the arts).

C. The "Literal Speaker" Factor And Related "Reasonable Observer" Test Weigh In Favor Of Texas. The State Manufactures License Plates, Approves Their Content, And Retains Ownership.

It is impossible to deny the state's essential role in issuing and regulating vehicle license plates. Prior to

the advent of specialty plate programs, no one would have attributed the content of the plates to private speakers. But as states have established and expanded specialty programs, blending limited private expression with a quintessentially government function, questions have baffled courts.

The "literal speaker"—third of the four factors—is closely related to the "reasonable observer" test the Fifth Circuit adopted. Some courts even condense the four factors into a reasonable observer inquiry. *Roach v. Stouffer*, 560 F.3d at 867 ("Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party.") That "one key question" has generated mixed results. Judge Smith, dissenting from the majority in this case, observed how a reasonable observer in prior cases might associate the message with a private speaker as well as the government—the Fraternal Order of the Eagles that donated the Ten Commandments monument in *Summum*; the physicians in *Rust*; the authors of school textbooks in *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (public school curriculum is government speech). *Vandergriff*, 759 F.3d at 403, 409 (Smith, J., dissenting).

Property ownership is relevant. "*Wells* reasoned that ownership of the means of communication was a valid consideration." *SCV I*, 288 F.3d at 621; *see Wells*, 257 F.3d at 1139 (city owned and maintained the holiday display). But it is hardly conclusive here. Vehicles are privately owned, while the state continues

to own the plates—and the two pieces of property are physically joined. It is no wonder there is confusion.

Some courts, including the Fifth Circuit, highlight the vehicle owner:

- *Vandergriff*, 759 F.3d at 393 ("Texas SCV argues that any reasonable observer would view a specialty license plate as the speech of the individual driving the car")
- *Tata*, 742 F.3d at 574 ("to any reasonable observer, the literal speaker of a message on a specialty plate that the observer knows the vehicle owner selected is surely the vehicle owner ")
- *Rose*, 361 F.3d at 794 (reasoning by analogy—"just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker")
- *Roach v. Stouffer*, 560 F.3d at 867 ("a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate ")

Other courts point to the state's ownership of the plate:

- *Stanton*, 515 F.3d at 966-967 ("the fact that Arizona owns the special organization plates supports a finding that the State is the literal speaker")
- *SCV I*, 288 F.3d at 621 ("Virginia continues to own the special plates at all times")

- *CLI*, 547 F.3d at 866 (license plates are "reasonably viewed as having the State's stamp of approval...owned and issued by the State")

Judge Smith's dissent highlights the flaws in bypassing the state's role and attributing the plate content solely to the vehicle owner:

> [L]icense plates broadcast an associational image of the state on Texas vehicles wherever they may travel...there are no license plates that do not bear the name of the state of registration, directly imputing the state's goodwill and reputation on whatever communication the plate bears.

Vandergriff, 759 F.3d at 406 (Smith, J., dissenting).

The "reasonable observer" will no doubt understand *both* the state's essential role in issuing and approving license plates, *and* the vehicle owner's decision to select a particular specialty plate. And in light of the technical differences among specialty plate programs—differences the typical observer may neither know nor understand—this is a wobbly test indeed. Even circuit courts cannot agree.

D. The State Bears Ultimate Responsibility For Regulation Of License Plates.

Courts often collapse "literal speaker" and "ultimate responsibility" and brush over this final factor. *See, e.g., Rose*, 361 F.3d at 794; *Roach v. Stouffer*, 560 F.3d 860, 867-868 (8th Cir. 2009); *SCV II*, 305 F.3d at 251 (Gregory, J., dissenting) ("The panel gave *very* short shrift to this factor—the factor I think may very well be a key to the case.") *Rose* and *Roach* both credited

private speakers with ultimate responsibility. The Fourth Circuit struggled but could not reach a clear conclusion:

> The "literal" speaker" here might be said to be the license plate itself, which would seem not to suggest either government or private speech strongly, and who bears "ultimate responsibility" for the speech is unclear.

SCV I, 288 F.3d at 621. In the Ninth Circuit, Arizona retained less control over the message and merely responded to applications from nonprofit organizations. "[T]he statutory requirements address[ed] who may speak, not what they may say." *Stanton*, 515 F.3d at 966. The Arizona License Plate Commission was statutorily obligated to approve the application and issue the plate if certain minimum requirements were met. *Id.* at 961. Under these circumstances, the Court held that Arizona Life Coalition was ultimately responsible for the speech.

In this case, even though the state shares responsibility and editorial discretion with private organizations and persons, "manufacturing specialty license plates...*require[s]* the government's assistance and complicity." *Vandergriff*, 759 F.3d at 407 (Smith, J., dissenting). It is difficult to conclude that private speakers bear "ultimate responsibility" when the state is responsible for passing legislation to authorize the plates, approving and regulating the content, manufacturing, and ownership. Overall, these facts compel the conclusion that Texas bears ultimate responsibility.

III. FIRST AMENDMENT IMPLICATIONS VARY UNDER DIFFERENT STATUTORY SCHEMES.

Specialty license plates undoubtedly involve an overlap between government and private expression. The state "speaks" by authorizing specific government messages on specialty license plates. A driver then communicates agreement by selecting a particular design. The messages coincide. But courts have wrestled with the First Amendment implications, particularly where a state declines to authorize a specific message. Their focus on the "mixed" nature of the speech, weighing and counting multiple factors, has generated confusion rather than a workable test.

Instead, it may be preferable to consider how different statutory schemes produce different results. First, government speech is most likely present where each specialty plate is authorized by statute with precise wording and restrictions on how the revenue may be used. Second, programs that provide for applications from private organizations *may* or may not open a forum for private speech, depending on the nature and scope of the state's role in the approval process. Third, individual personalized "vanity" plates are most likely to open a forum subject to First Amendment principles.

A. Plates Expressly Authorized By Statute Are Most Likely To Be Government Speech.

Many of the license plate cases involve express statutory authorization for specific specialty plates. The statute typically identifies the precise wording and

often restricts use of the proceeds. With this level of government control, the analysis should be straightforward: government speech. Instead, several circuits have employed the four-factor test and greatly confused the issue.

The recent North Carolina case in the Fourth Circuit is one where the General Assembly had to pass legislation, "An Act to Authorize the Division of Motor Vehicles to Issue Various Special Registration Plates," in order to approve a "Choose Life" plate. *Tata*, 742 F.3d at 566. The Court nevertheless ruled there was impermissible viewpoint discrimination because the state declined to also pass legislation authorizing a pro-abortion plate. *Id.* A decade earlier, the Fourth Circuit applied the four-factor analysis to South Carolina's similar statutory scheme, found that it led to an "indeterminable result," but nevertheless struck it down on First Amendment grounds. *Rose*, 361 F.3d at 793.

In a Tennessee case, the Sixth Circuit applied this Court's holding in *Johanns* to reach the eminently reasonable conclusion that the plates were government speech:

> *Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.

Bredesen, 441 F.3d at 375. The Tennessee program appears to be the epitome of a government-controlled scheme that qualifies as government speech.

The Seventh Circuit acknowledged the split among other circuits, but declined to acknowledge Illinois' statutory scheme as government speech—even though the statute was amended (while the case was pending) to "require express prior legislative approval" for issuance of new plates. *CLI*, 547 F.3d at 855.

B. Plates Issued In Response To Applications May Open A Forum—Or Not—Depending On How The Process Is Structured.

Some states provide an application process for private organizations to design and propose a specialty license plate. The state may relinquish significant control to these organizations, within the applicable space limits. Depending on how the program is structured and the degree of control retained by the state, a forum may be established.

The Eighth Circuit considered a Missouri case where the state provided more than one method to initiate a specialty plate. The state legislature could pass a bill creating a plate or a private organization could submit an application proposing one. *Roach v. Stouffer*, 560 F.3d at 862. Under the second method, "both the state and the sponsoring organization exercise some degree of editorial control over the messages on specialty plates." *Id.* at 867. This arrangement is more characteristic of a forum than the strictly state-controlled statutory schemes in other cases. Missouri's process was found constitutionally deficient because it granted officials unbridled discretion to decline an application. *Id.* at 870.

Arizona enacted an application process that contrasts with Missouri's process in constitutionally relevant ways. There, the statute provided that "[t]he [C]ommission *shall* authorize a special organization plate if the organization" met certain minimal general requirements, such as serving the community. *Stanton*, 515 F.3d at 961. The message was crafted by the applicant organization, and the Arizona License Plate Commission was obligated to approve the plate once the basic requirements were met.

In both Missouri and Arizona, the state rolled back its control and opened the program for private expression. In Texas, the state has retained significantly more control over a program allowing private organizations to apply for a plate. When a plate is proposed, the Texas Department of Motor Vehicles Board must approve the plate's design. Tex. Transp. Code Ann. § 504.801(c); 43 Tex. Admin. Code §§ 217.28(i)(7), .40; Pet. Br. 4-5.. Unlike Missouri and Arizona, Texas has not created a forum for private speech.

C. Individual Personalized Vanity Plates Are Most Likely To Open A Forum For Private Expression.

Many states now offer individual vehicle owners an opportunity to design unique "vanity" plates. There are typically limits on the number of characters, and a new plate may not duplicate an existing plate. It is also common to restrict the use of highly offensive terms (profanity, obscenity).

The Second and Eighth Circuits have both considered vanity plates. The Eight Circuit implied

that vanity plates communicate private speech by comparing them to bumper stickers—even though Missouri technically owns the plates. *Lewis v. Wilson*, 253 F.3d at 1079. The Second Circuit concluded that a similar program in Vermont implicated private speech, and extensively discussed the nature of the forum. The plaintiff, who wanted a plate bearing the letters "SHTHPNS," insisted the plates were a designated public forum, while the state argued for a nonpublic forum. *Perry v. McDonald*, 280 F.3d at 167. The Court agreed with the state. The state imposed numerous restrictions, such as the number of characters on the plate. "Such extensive government regulation of expressive activity does not suggest an intent to designate a public forum." *Id.* at 167-168. The Court found Vermont's scheme analogous to the school's internal mail system in *Perry Educ. Ass'n*, (principal's permission was required for access). *Id.* at 168 n. 6, citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 47 (1983).

Even in this context, where individual vanity plates are certainly private speech, the Second Circuit held that the state established only a nonpublic forum—the forum with the lowest level of First Amendment protection and greatest discretion for the state.

CONCLUSION

This Court should reverse the ruling of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF OF OHIO, ARKANSAS, COLORADO, HAWAI'I, ILLINOIS, INDIANA, MICHIGAN, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, AND WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

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STATEMENT OF *AMICI* INTEREST

Texas is not the only State that has adopted some type of specialty-license-plate program. As the appendix to this *amicus* brief illustrates, most States have passed laws authorizing vehicle owners to purchase specialty plates containing specific messages. The Fifth Circuit below ruled that those messages qualify as "private speech" solely because a "reasonable observer" would view the license plates in that light, and so the court subjected Texas to a broad viewpoint-neutrality requirement for all messages on specialty plates. Pet. App. 11a-24a. If adopted by this Court as a national rule, the Fifth Circuit's view could dramatically affect the States' specialty-license-plate programs. In particular, its reasonable-observer test could eliminate a State's ability to keep democratic control over license-plate messages even through legislation specifically identifying all state-approved messages as the State's own. Because the *amici* States desire to retain that control, they file this brief in support of the Texas Petitioners.

SUMMARY OF ARGUMENT

Whether assessed from a practical perspective or from a legal perspective, the Fifth Circuit's holding that speech on specialty license plates must satisfy a broad viewpoint-neutrality rule lacks merit.

I. Starting with the practical perspective, in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Court looked to the "consequences" of adopting a viewpoint-neutral test for monuments in public parks when holding that those monuments qualify as government speech that can be viewpoint based. If a government permitted a monument honoring veterans of a certain war, the Court reasoned,

a viewpoint-neutral test would require it to accept an opposing monument questioning those veterans' sacrifice. The Court found that result untenable.

These consequences are just as relevant for specialty license plates as they are for public-park monuments. A nationwide review of the messages on the States' specialty plates shows that, just as with park monuments, the States have authorized plates expressing certain viewpoints (and not others) on many topics. States, for example, have authorized specialty plates supporting the military, but not plates questioning its role in our society. Likewise, States have authorized specialty plates promoting either patriotism in our country or pride in the State's heritage, without authorizing plates denigrating the country or the State's history. And States have authorized specialty plates promoting positions on a variety of policy questions without approving plates taking a different tack on those questions. Because a broad viewpoint-neutral test could substantially change the nature of the States' specialty-license-plate programs, the Court should be wary of treating specialty plates as a forum for private speech.

The circuit courts that have held that messages on specialty plates qualify as private speech have given inadequate attention to these potential consequences. Most courts, like the Fifth Circuit below, have simply ignored them. By comparison, the Fourth Circuit's view that the States could use neutral rules for specialty plates to eliminate these potentially far-reaching effects conflicts with this Court's rejection of a similar suggestion in *Summum*.

II. Turning to the legal perspective, this Court has never adopted anything like the Fifth Circuit's "reasonable-observer" standard in cases (like this

one) involving a government's refusal to subsidize speech. Those governmental subsidies, the Court has noted, can take different forms. The government at times allows private actors to use its *property* to undertake expressive activities; at other times the government may provide its *funds* for those expressive activities. In these "subsidy" or "forum" cases, the Court has applied three different standards of First Amendment scrutiny to laws that grant subsidies to some speech and not to other speech. For cases involving a traditional or designated public forum, the Court requires the government to grant access to the forum in a content-neutral manner. For cases involving a limited or nonpublic forum, the Court requires the government to grant access to the forum in a reasonable and viewpoint-neutral manner. For cases involving the government's own speech, the Court allows the government to use its property or funds to subsidize particular viewpoints without having to subsidize opposing viewpoints.

The Fifth Circuit's reasonable-observer test conflicts with this Court's cases choosing between these three standards of scrutiny in a given case. *First*, to distinguish a *designated public forum* from a *nonpublic forum*, the Court has adopted a government-intent test, one that asks whether the government meant to open its property as a broad forum for debate. That standard is incompatible with the Fifth Circuit's reasonable-observer test, which could often result in a "public forum" finding contrary to what the government intended. The standard, moreover, would be dispositive here. It is obvious that most States did not intend to create a nonpublic forum with their license-plate programs, as most retain ultimate control over the permitted messages.

Second, to distinguish between *private speech* in a public or nonpublic forum and *government speech* under the Establishment Clause, the Court has expressly rejected the use of a reasonable-observer test. It has instead asked whether the government sufficiently controls the speech at issue. A reasonable-observer test, by contrast, could silence a private speaker based simply on the mistaken view that the speaker's expression was the government's own. These cases, incompatible with the Fifth Circuit's reasonable-observer test, likewise show that the license-plate messages should qualify as government speech rather than private speech in a forum.

ARGUMENT

The Texas Petitioners have shown that, under the Court's cases distinguishing between government speech and private speech, the Court should view the messages on Texas specialty plates as government speech (allowing Texas to issue plates bearing some viewpoints but not others). *See* Pet'rs Br. 15-46. This *amicus* brief adds two points—one pragmatic, the other legal—in support of the Texas Petitioners. As for the pragmatic, the Court should consider the Fifth Circuit's viewpoint-neutrality test with its eyes open to the effect the test could have on the States' specialty-license-plate programs. Most States use those plates to promote specific viewpoints on a subject, not to open a broad debating forum. Such a use could become all but impossible if this Court adopted a broad viewpoint-neutral rule requiring States to sponsor all views on a subject once they authorize one view. As for the legal, the Court should evaluate the Fifth Circuit's reasonable-observer test against the general principles it has applied in "subsidy" cas-

es (like this one) involving a government's refusal to promote speech rather than the government's restriction on speech. Those general principles show that the reasonable-observer test has no legal grounding in this context.

I. Most States Have Used Specialty License Plates To Authorize Specific Messages, Not To Create "Debating Forums"

As the Texas Petitioners have shown (Pet'rs Br. 32-41), the Court should be guided by *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), which held that the government may engage in viewpoint discrimination when selecting monuments for public parks from private donors. The *amici* States seek to highlight one aspect of *Summum*: When rejecting the argument that the government could simply adopt neutral "'time, place and manner restrictions'" for park monuments, the Court relied on the "consequences" of that rule. *Id.* at 479. It would mean, among other things, that the United States' decision to accept the Statue of Liberty from France triggered a constitutional duty to "provid[e] a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia)." *Id.* The Court found it "obvious" that "if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations." *Id.* at 480. And it said that "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." *Id.*

Similar logic applies to specialty license plates. As with park monuments, *see id.* at 472, most States control the messages permitted on their license plates (although they do so in different ways). *See* Stephanie S. Bell, Note, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 Mo. L. Rev. 1279, 1281-84 (2008). Some allow vehicle owners to obtain only those plates authorized by legislation. *See, e.g.*, Ohio Rev. Code §§ 4503.431-.433, .46-.481, .491-.591, .67-.762, .85-.96 (identifying all approved plates). Others rely on state agencies to consider all specialty-plate applications. *See, e.g.*, Ky. Rev. Stat. Ann. § 186.164(9)-(15). Still others allow for the creation of specialty plates through a combination of legislative, administrative, and/or third-party processes subject to final authority by state agents. *See, e.g.*, Pet'rs Br. 4-5. In most cases, the States' ultimate discretion over the design and issuance of a specialty plate—be it through the legislative or administrative process—is apparent.

Further, as with park monuments, *see Summum*, 555 U.S. at 479-80, most States' specialty plates articulate certain viewpoints on a topic but not others. Accordingly, a viewpoint-neutral test has similar consequences in this case as it did in *Summum*. Even a cursory review of specialty plates from around the country shows that a viewpoint-neutral test for any topic touched by a specialty plate could alter the nature of the States' programs. *See* Part I.A. The circuit courts that have disagreed with the States, by contrast, have largely ignored the consequences that *Summum* found important. *See* Part I.B. Here, as in *Summum*, the consequences of a viewpoint-neutral test go a long way toward showing

that most States did not intend to create any kind of "forum" with their specialty license plates.

A. States Have Used Specialty License Plates To Authorize Specific Viewpoints Across A Range Of General Topics

Through their specialty-license-plate programs, States have authorized vehicle owners to purchase plates expressing limited viewpoints on many subjects. These laws are, for the most part, incompatible with the notion that the States intended to create mini debating forums on issues of the day rather than to promote views that the States approve.

Most commonly, States have authorized specialty plates promoting the military. They have issued plates paying tribute to the military generally, including "Thank You U.S. Military" plates, Ohio Rev. Code § 4503.531, "Support our Troops" plates, Alaska Stat. Ann. § 28.10.181(x); N.C. Gen. Stat. Ann. § 20-79.4(b)(221), "Lest We Forget" plates, Mich. Comp. Laws § 257.811m, or "Florida Salutes Veterans" plates, Fla. Stat. Ann. § 320.08058(4). States have also issued plates "publicly recognizing" veterans who fought in specific wars or received specific medals. *See, e.g.*, N.M. Stat. Ann. §§ 66-3-418 to -419; Ohio Rev. Code §§ 4503.431-.433 (medals); Hawaii Rev. Stat. Ann. § 249-9.2(b) (wars). Funds from the plates often help military causes. *See, e.g.*, Conn. Gen. Stat. Ann. § 14-21u; Ind. Code §§ 9-29-5-38.5, 10-17-12-8. Yet, under the Fifth Circuit's view, the First Amendment could require States that have approved, say, plates supporting "Vietnam Veterans," La. Rev. Stat. Ann. § 47:490.13(A), to issue counter plates "questioning the cause for which [those] veterans fought." *Summum*, 555 U.S. at 480. That conse-

quence is no more palatable on license plates than it is on park monuments. While Paul Robert Cohen may have a right to express his (perhaps ineloquent) views about Vietnam on his jacket, *Cohen v. California*, 403 U.S. 15 (1971), he does not have a right to imprint those views on the States' license plates.

Aside from the military, States have issued specialty plates designed to promote pride in this country. Some, for example, have authorized a "Proud To Be An American" plate. *See, e.g.*, Ala. Code § 32-6-600; Mich. Comp. Laws § 257.811o. Others have similar plates recognizing patriotism or solidarity in the wake of the September 11 tragedy. *See* Conn. Gen. Stat. Ann. § 14-21o; N.M. Stat. Ann. § 66-3-424.17; Okla. Stat. tit. 47, § 1135.5(B)(32); R.I. Gen. Laws § 31-3-91. And still others have plates supporting the U.S. Olympic team (with a "Go Team USA" message). *See, e.g.*, Conn. Gen. Stat. Ann. § 14-21*l*; Fla. Stat. Ann. § 320.08058(6). Little did these States know that when they authorized these patriotic plates, according to the Fifth Circuit, they might have committed themselves to approve "Ashamed To Be An American" or "Go Team Russia" plates. But the Westboro Baptist Church's right to proclaim "'God Hates the USA/Thank God for 9/11'" on public sidewalks, *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011), should not extend to the States' license plates.

Switching from the national to the local, many States have approved messages fostering state pride, history, or culture. Ohio's "leader in flight" plate, for example, generates funds for a nonprofit promoting the city of Dayton's role in creating the airplane. Ohio Rev. Code §§ 4501.21, 4503.73. North Carolina, by contrast, has a "first in flight" plate for its vehicle

owners. *See* N.C. Gen. Stat. Ann. § 20-63(b). The Fifth Circuit's viewpoint-neutral test could suggest that Ohio has a duty to issue plates endorsing North Carolina as the "true" leader in flight. *Cf.* Patrick Jonsson, *First in Flight: Ohio or North Carolina?*, Christian Science Monitor (Mar. 10, 2003), *available at* http://www.csmonitor.com/2003/0310/p02s01-usgn.html (last visited on Jan. 6, 2015).

Similar examples abound. Idaho drivers might encounter plates promoting that State's "Famous Potatoes." *See* Idaho Code § 49-417c. Maine drivers might come across plates promoting that State's "Lobsters." *See* Me. Rev. Stat. tit. 29-A, § 456-A. Alaska offers plates promoting dog mushing and those who have finished the famed Iditarod race. *See* Alaska Stat. Ann. § 28.10.181(s), (y). Massachusetts has authorized a plate bearing the words "Boston Strong" and memorializing the 2013 bombing of the Boston Marathon. *See* Mass. Gen. Laws ch. 90, § 2e(d). New York allows its citizens to obtain "I Love New York" plates. *See* N.Y. Veh. & Traf. § 404-s. All of these plates express specific viewpoints; none opens up any kind of debating forum for all other viewpoints on that general topic.

Likewise, many States have adopted specialty plates endorsing *only* the sports teams or universities within the state and providing funding for local charities or in-state universities. *See, e.g.*, Ohio Rev. Code §§ 4503.51(E), 4501.21; Alaska Stat. Ann. § 28.10.181(o); Wash. Rev. Code §§ 46.18.215, .225. The Fifth Circuit's viewpoint-neutral test could suggest that once Wisconsin approved a Green Bay Packers plate, *see* Wis. Stat. § 341.14(6r)(f)(55), it was required to issue competing plates for Wisconsinites favoring the Chicago Bears, *cf.* 5 Ill. Comp.

Stat. Ann. 5/3-658(b). Likewise, by authorizing vehicle owners to promote state pride in (and funding for) The Ohio State University, *see* Ohio Rev. Code § 4503.51(E), must Ohio authorize license plates promoting pride in (and funding for) the University of Michigan? Must Michigan do the reverse? *See* Mich. Comp. Laws § 257.811e(4).

Apart from promoting state pride, States have authorized specialty plates on policy questions. Many States have approved license plates endorsing environmental conservation, such as "Protect our Environment" plates, Ala. Code § 32-6-155.1, "Protecting our Waters" plates, Mich. Comp. Laws § 257.811i, or "Save the Manatee" plates, Fla. Stat. Ann. § 320.08058(1). Often the funds collected for these plates are marked for environmental causes shared by the State. *See, e.g.*, Ga. Code § 40-2-86(*l*)(45) (proceeds of Georgia Sea Turtle Center plate to a wildlife conservation fund); Md. Code Ann., Transp. § 13-618(c)(2)(v) (proceeds of Chesapeake Bay Commemorative Registration plate to the Chesapeake Bay Trust). These States should not have to issue plates favoring different priorities. Colorado's "advancing clean energy" plate, *see* Colo. Rev. Stat. § 42-3-228, for example, should not compel it to adopt a "coal keeps the lights on" plate, *see* Ohio Rev. Code § 4503.96.

Many other examples exist in in the policy arena. If States approve plates encouraging the spaying or neutering of pets, *see, e.g.*, Ariz. Rev. Stat. Ann. § 28-2422, must they authorize plates opposing mandatory spaying-or-neutering laws? If States approve plates encouraging organ donation, *see, e.g.*, W. Va. Code § 17A-3-14(c)(48), must they authorize plates encouraging the legalization of organ sales? Or if

States approve plates with anti-drug messages for children, *see, e.g.*, N.Y. Veh. & Traf. § 404-u, must they authorize messages advocating drug legalization? *See Morse v. Frederick*, 551 U.S. 393 (2007); *cf. Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 697 (6th Cir. 2013) (Sutton, J.) (expressing skepticism, under a viewpoint-neutral test, over whether the government could "urge people to 'Register and Vote,' 'Win the War,' 'Buy U.S. Bonds' or 'Spay or Neuter Your Pets' without incurring an obligation to sponsor opposing messages").

The litigation frenzy that has ensued over "Choose Life" plates shows what might be in store for the States more generally if this Court adopts a nationwide viewpoint-neutral test across all specialty plates. Some States have chosen to authorize Choose Life plates to promote adoption and to generate funds for nonprofit entities assisting with adoption. *See, e.g.*, Ohio Rev. Code §§ 3701.65, 4503.91; Fla. Stat. Ann. § 320.08058(29); Tenn. Code Ann. § 55-4-306. A portion of these States then faced litigation to *enjoin* them from issuing the plates. *See ACLU of N.C. v. Tata*, 742 F.3d 563, 567 (4th Cir. 2014); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 788-89 (4th Cir. 2004). Other States, by contrast, opted not to adopt those plates. A portion of those States then faced litigation to *compel* them to issue the plates. *See Roach v. Stouffer*, 560 F.3d 860, 861-63 (8th Cir. 2009); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 972-73 (9th Cir. 2008). States should not be put to this dilemma between eliminating their specialty-license-plate programs or facing perennial litigation over every approval or disapproval decision.

B. Lower Courts Have Paid Insufficient Attention To The Consequences Of A Broad Viewpoint-Neutral Requirement

As the Texas Petitioners note (Pet'rs Br. 10), the Fifth Circuit *ignored* the consequences of its private-speech holding and so made no effort to limit the reach of its viewpoint-neutral test. *See* Pet. App. 8a-16a. Indeed, the Fifth Circuit's broad view of what "viewpoint neutral" means only exacerbates these potential consequences. *See* Pet. App. 17a-24a. Likewise, most other circuit courts that have reached similar private-speech conclusions have overlooked these impacts. *See, e.g.*, *Roach*, 560 F.3d at 864-68; *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 859-64 (7th Cir. 2008); *Ariz. Life Coal.*, 515 F.3d at 963-68; *Women's Emergency Network v. Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003); *cf. ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 391 (6th Cir. 2006) (Martin, J., dissenting) (conceding that "[i]f the KKK and Nazi Party are able to pull together 1,000 proud, dues-paying members, who wish to display such license plates on their cars, they are entitled to do so").

As far as the *amici* States are aware, only the Fourth Circuit has addressed this concern that a viewpoint-neutral test might be the "death knell for specialty plates." *ACLU of N.C.*, 742 F.3d at 575. It gave two responses to that "[m]elodrama." *Id.* It said initially that *neutral* requirements for license plates (such as a requirement that the State receive "three hundred applicants before issuing a new specialty plate") would likely keep "'frivolous'" messages off of the States' roads. *Id.* (citation omitted). It then added that if these neutral rules did not suffice to do so, the States could always "choose to avoid debate [on a particular topic] altogether" when they did

not want to express all viewpoints on that topic. *Id.* Both responses are misguided.

The Fourth Circuit's first response—that neutral requirements can alleviate these consequences—has *already* been rejected by this Court. *See Summum*, 555 U.S. at 479. Like the Fourth Circuit, the challengers in the public-monument context "deride[d] the fears expressed about the consequences" of a neutral rule for park monuments, saying that usual time, place, and manner restrictions could adequately address the government's concerns. *Id.* The Court rejected that derision, finding that "those concerns [were] well founded." *Id.* The concerns are no more "melodrama" in this context than they are in that one. *Cf. Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (requiring "Aryan-1" *vanity* plate).

Ironically, moreover, the Fourth Circuit's *merits* answer to these consequences runs headlong into its *standing* holding. In the license-plate context, the Fourth Circuit treats as the relevant "injury" not the inability to obtain a preferred plate but the mere discriminatory "playing field" resulting from a viewpoint-based plate, thus giving challengers *veto* power over any plate with which they disagree. *Rose*, 361 F.3d at 790-92 (Michael, J., op.); *see ACLU of N.C.*, 742 F.3d at 575 (enjoining plate). Under the Fourth Circuit's questionable logic, even a *single* person who disagreed with a "Support our Troops" or "Protect our Environment" plate could *stop* the State from issuing that plate without first satisfying the neutral rules for obtaining an opposing plate (the rules the Fourth Circuit identified as adequate to protect the State from a flood of lawsuits). "A First Amendment jurisprudence yielding these results does not promote

speech but represses it." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

There is also something odd with the judiciary giving a suggestion to the political branches on how they may adopt neutral rules in such a manner as to "*filter out*" minority viewpoints that they deem "'frivolous.'" *ACLU of N.C.*, 742 F.3d at 575 (emphasis added; citation omitted). After all, when the First Amendment does get triggered, this Court has long viewed with a skeptical eye even neutral speech restrictions that it believed were really "aimed at the suppression of ideas." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). As in *Summum*, this very suggestion goes a long way toward showing that license plates are fundamentally different from actual forums for speech. *See* 555 U.S. at 479-80.

The Fourth Circuit's second response—that a State may exit the "debate" on a topic if it does not want to express both sides—was also already rejected by the Court. *See id.* at 479 (rejecting suggestion that a government had "'the option of a ban on all unattended displays'"). That was for good reason. It conflicts with the government's "right to 'speak for itself'" on a particular topic of the day, even a controversial one. *See id.* at 467 (citation omitted); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). It also overlooks the importance of the issue. States have found specialty license plates useful to generate substantial charitable funds for nonprofit entities or activities whose messages they approve. *See, e.g.*, Ohio Rev. Code § 4501.21 (listing organizations and purposes to be funded through fees received from each plate); Mass. Gen. Laws ch. 90, § 2e (same); Tenn.

Code Ann. §§ 55-4-215 to -219 (same); *see also* Bell, 73 Mo. L. Rev. at 1279 & n.1 (noting that millions of dollars have been raised from various plates).

One last point. Some courts have invoked the *opposite* consequence that could arise from a government-speech holding for specialty license plates—for example, that the States could approve blatantly partisan messages on their license plates. This overlooks the democracy "buffer" that arises whenever courts uphold the political branches' policies in the face of a constitutional attack. "[O]f course, a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'" *Summum*, 555 U.S. 468 (citation omitted). Just as it is unlikely that governments will place fixed tributes to the political parties in public parks, it is unlikely they will do so on license plates. Indeed, in addition to the general laws that the Texas Petitioners identified against potential abuses (Pet'rs Br. 45-46), several States have provisions in the specific license-plate context restricting political messages. *See, e.g.*, Ark. Code. Ann. § 27-24-1402(d); N.D. Cent. Code § 39-04-10.13(2).

II. The Fifth Circuit's Reasonable-Observer Test To Distinguish Government Speech From Private Speech Conflicts With General First Amendment Principles

The Texas Petitioners offered several reasons why the divide between government speech and private speech should not rest on a reasonable observer's perspective. *See* Pet'rs Br. 27-32. The *amici* States seek to add to their analysis by illustrating that the Court's "forum" or "subsidy" cases have used three categories of scrutiny to assess laws that merely re-

fuse to subsidize certain speech, and that the Court has never adopted a "reasonable observer" test to choose between these categories of scrutiny.

A. The Court Has Adopted Three General Categories Of Scrutiny For Laws That Merely Refuse To Promote—Rather Than Directly Prohibit—Speech

Because the First Amendment's text regulates laws "abridging" the freedom of speech, an obvious difference exists between laws that directly *prohibit* speech and laws that merely *refuse to promote* speech—i.e., a difference between laws "wielding the stick of prohibition" and laws "dangling the carrot of subsidy." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 683 (2010); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998). For example, simply because the government cannot punish an individual for burning a flag, *Texas v. Johnson*, 491 U.S. 397 (1989), does not mean the government must pay for the individual's matches to do so.

A "Government 'subsidy'" of speech can take different forms. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). Sometimes the government opens its checkbook for certain speech. *See id.* at 192-93 (citing *funding* cases). Other times the government opens its property for certain speech. *See id.* at 200 (citing *forum* cases). Either way, a litigant challenging its inability to obtain the use of the government's money or property for its speech must show something *more* than the absence of that subsidy, because "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540,

549 (1983). What that "more" is depends on the nature of the denied subsidy. In this "subsidy" context, the Court has adopted three categories of scrutiny falling along a spectrum: (1) some speech subsidies must be granted on a *content-neutral* basis; (2) others may be granted in a content-based way but must be *reasonable* and *viewpoint neutral*; and (3) still others may be *viewpoint based*.

1. *Speech Subsidies That Must Be Content Neutral: Public Forums.* At one end of the spectrum, the Court scrutinizes for content neutrality laws banning speech in a "traditional public forum"—i.e., property like a park that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Summum*, 555 U.S. at 469 (internal quotation marks omitted). The government may enact time, place, and manner restrictions for speech in such a forum, but laws discriminating based on the speech's content must survive strict scrutiny. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). So, for example, the government may limit the noise level of all speech (no matter its content) emanating from a traditional forum, *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989), but cannot enact picketing regulations for that forum allowing picketers to protest some things but not others, *see Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

In addition to *traditional* forums, the government can create a public forum by putting property that has not historically facilitated speech to a new speech-promoting use. When the government creates

such a *designated* forum, the same content-neutral rules apply. *Summum*, 555 U.S. at 469. The Court has, for example, applied those rules to a theater open for all productions, *see Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-57 (1975), a school-board meeting open to all citizens, *see Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 174 n.6 (1976), and a school's facilities open to all groups, *see Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *see also Cornelius*, 473 U.S. at 803.

2. *Speech Subsidies That Must Be Reasonable And Viewpoint Neutral: Nonpublic Forums.* In the middle of the spectrum, the Court analyzes subsidies designed to facilitate private speech about certain topics or by certain groups (thereby excluding other topics or groups) for both *reasonableness* and *viewpoint neutrality*. The Court has at times called this narrower subsidy a "nonpublic forum." *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007). It has at other times referred to it as a "limited public forum." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 105-06 (2001). Whatever the name, the same standard applies: Any restriction for only certain speech "must not discriminate against speech on the basis of viewpoint," and "must be 'reasonable in light of the purpose served by the forum.'" *Id.* (citations omitted).

The Court has applied this test to the use of both property and funds for private speech. As for property, the Court has applied it to a school district's decision to open its facilities to only certain topics, *see id.* at 103-07; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-94 (1993), and the federal government's decision to open a charitable drive to only certain charities, *see Cornelius*, 473 U.S.

at 805-12. As for funds, the Court has applied the test to a university's decision to pay certain costs of student magazines, *see Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-37 (1995), a State's decision to subsidize only non-electioneering union speech, *see Davenport*, 551 U.S. at 188-90, and Congress's decision to subsidize only nonprofit entities that do not lobby, *see Regan*, 461 U.S. at 549-51.

3. *Speech Subsidies That Can Be Viewpoint Based: Government Speech.* At the other end of the spectrum, when the government uses its property or money to "engag[e] in [its] own expressive conduct, then the Free Speech Clause has no application." *Summum*, 555 U.S. at 467. While formal recognition of this rule may be "recently minted," *id.* at 481 (Stevens, J., concurring), "[i]t is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional" if the government could not commend some views while condemning others. *Block v. Meese*, 793 F.2d 1303, 1313 (D.C. Cir. 1986) (Scalia, J.). The contrary "rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism." *Id.*

The Court has found that the government may express its views in different ways. It may use its public property to convey a message. *See Summum*, 555 U.S. at 470. It may pay "private speakers to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833; *see Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560-62

(2005). And "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833; *see United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 204-06 (2003) (plurality op.). Finally, the government may pay its own employees to express its views. *See Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006).

B. The Court Has Never Adopted A Reasonable-Observer Test To Distinguish Between These Categories Of Scrutiny

For two reasons, the Fifth Circuit's reasonable-observer test to distinguish government speech from private speech is incompatible with the Court's cases in this area. *First*, the Court has rejected a reasonable-observer test to distinguish a designated forum from a nonpublic forum. *Second*, the Court has rejected a reasonable-observer test to distinguish private speech in a forum from government speech for purposes of the Establishment Clause. To maintain harmony among this Court's First Amendment principles, the reasonable-observer test should be rejected in the present context as well.

1. The difference between a designated forum and a nonpublic forum turns on the government's intent, not on a reasonable observer's view

This Court has adopted a well-established test to distinguish between a broader *designated forum* (access to which must be granted in a content-neutral manner) and a narrower *nonpublic forum* (access to which need only be granted in a reasonable and

viewpoint-neutral way). A similar test should be used to distinguish between *government speech* and private speech in a *nonpublic forum* because, as articulated below, both contexts share logical underpinnings. Notably, moreover, the Court's test to distinguish between these forums does *not* support the Fifth Circuit's reasonable-observer test; if anything, it shows that most specialty-license-plate programs should qualify as government speech.

To create a designated (rather than a nonpublic) forum, "the government must make an affirmative choice to open up its property for use as a public forum." *Am. Library Ass'n*, 539 U.S. at 206 (plurality op.). The Court thus "look[s] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. In other words, "this distinction" between a designated public forum and a nonpublic forum "turns on *governmental intent*." *Forbes*, 523 U.S. at 680 (emphasis added); *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (noting that cases that have found designated "public forums to have been created" have identified a "'clear intent'" on the government's part to do so (citation omitted)). This test is illuminating here.

As an initial matter, this *government-intent* test conflicts with the Fifth Circuit's *reasonable-observer* test. Applying the government-intent test, for example, the Court has rejected the notion that a government may "create a public forum by inaction or by permitting limited discourse." *Cornelius*, 473 U.S. at 802. That is because "the government retains the choice of whether to designate its property" as a designated forum. *Forbes*, 523 U.S. at 680. Yet a rea-

sonable-observer test would often reach the opposite conclusion on those facts—the government's inaction in allowing debate could suggest to a "reasonable observer" that a designated forum had been created no matter what the government's intentions.

Indeed, cases that have found that the government did not create a designated forum likely could have come out the other way under a reasonable-observer test. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), for example, the Court evaluated a city's policy banning campaign speech on the written "car cards" in its public rapid transit system. *Id.* at 299 (plurality op.). It found that no designated forum had been created by examining the city's policies (not a reasonable observer's hunches), noting that those policies rejected all campaign speech on the car cards. *Id.* at 303-04. A reasonable observer, by contrast, might easily have viewed the city as creating a broad forum because the city had permitted a wide array of car-card speech, including *not just* commercial "ads from cigarette companies, banks, savings and loan associations, liquor companies, [and] retail and service establishments" *but also* nonprofit ads from "churches, and civic and public-service oriented groups." *Id.* at 300.

Further, it makes little sense to apply different tests in these two contexts. The question of whether the government is creating a forum, and what type, is linked with the question of whether the government is instead itself speaking. *Cf. Summum*, 555 U.S. at 467 ("Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?"). And the Court adopted the government-intent test to distinguish broader forums from narrower ones primarily because "the govern-

ment—like other property owners—"has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679-80 (1992) (citation omitted). In other words, the government need not "indefinitely retain [a designated forum's] open character," *Perry Educ.*, 460 U.S. at 46, and may change that status by changing the relevant rules for the forum. Identical logic should apply for determining whether the government meant to use its property (here, license plates) to create any type of forum *at all*. If, as the Court has held, there are no "accidental" *designated* forums, *see Forbes*, 523 U.S. at 678, it is hard to see why there should be "accidental" *nonpublic* forums. Both types of forums remain under democratic control subject to democratic change concerning the forum's nature or even its existence. *See id.* at 680 (noting that the government-intent test "reflects the reality that, with the exception of traditional public fora, the government retains the choice of whether to designate its property as a forum for specified classes of speakers").

If this government-intent test applied to the States' specialty-license-plate programs, moreover, it would be inescapable that the messages permitted under those programs qualify as government speech rather than private speech. For one thing, the fact that most States retain *control* over what messages get imprinted on their license plates shows that they did not intend to create a forum for private speakers to express any viewpoints they wish. *Cf. Forbes*, 523 U.S. at 673-75 (holding that airtime on a government television station is not a forum because the state "broadcaster exercises *editorial discretion* in the selection and presentation of its programming" (em-

phasis added)). For another thing, the consequences discussed in Part I show how implausible it is to conclude that the government would intentionally turn its state-issued license plates into a forum for all competing viewpoints on a topic once it authorizes a specialty plate stating one viewpoint on that topic.

In those cases where the Court has found that the government created a nonpublic forum for private speech, by comparison, it was obvious that the government intended to do so. In *Rosenberger*, for example, the university affirmatively indicated "that the student groups eligible for [its governmental] support [were] not the University's agents, [were] not subject to its control, and [were] not its responsibility." 515 U.S. at 835. Instead, the university merely gave them a subsidy to "convey their own messages." *Id.*; *see also, e.g.*, *Cornelius*, 473 U.S. at 798-99 (noting that, while government set neutral standards for charity's speech in the combined federal campaign, the messages were the participants' own).

2. Under the Establishment Clause, a reasonable-observer test does not distinguish private speech from government speech

The test that the Court has used to distinguish private speech in a government-created forum from government speech under the *Establishment Clause* also may be useful for identifying the proper test to distinguish the same two things under the *Free Speech Clause*. After all, both clauses reside in the same First Amendment. In the Establishment Clause context, the Court has recognized that "'[t]here is a crucial difference between *government* speech endorsing religion, which the Establishment

Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 765 (1995) (plurality op.) (quoting *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.)). In this context, too, the Court has never adopted a reasonable-observer test to distinguish private speech from government speech.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), for example, it applied something akin to a "control" test to distinguish private and government speech. There, the Court considered a high-school policy allowing the student body to vote on whether a student should give a pre-game message (including a prayer if the student so chose) at football games. *Id.* at 298 & n.6. The high school argued that the Establishment Clause did not prohibit this practice because the "messages [were] private student speech, not public speech," and the school had merely created a limited forum for private speech. *Id.* at 302. The Court was "not persuaded that the pregame invocations should be graded as 'private speech.'" *Id.* That was because the "invocations [were] authorized by a government policy and [took] place on government property at government-sponsored school-related events." *Id.* Further, government regulations "confine[d] the content and topic of the student's message," placing the policy outside this Court's forum cases. *See id.* at 303.

Not only that, a plurality of this Court has *expressly rejected* a reasonable-observer test to divide government speech from private speech. In *Pinette*, Ohio officials argued that they did not have to allow a private speaker (the Ku Klux Klan) to place a cross

on a public forum (the capitol square surrounding Ohio's statehouse) because it would violate the Establishment Clause. *See* 515 U.S. at 761 (plurality op.). In particular, the officials argued that the private speech should be viewed as government speech because of "the forum's proximity to the seat of government, which, they contend[ed], may produce the perception that the cross bears the State's approval." *Id.* at 763. The plurality disagreed: "It has radical implications for our public policy to suggest that neutral laws [creating a forum] are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement." *Id.* at 768. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Id.* at 766.

The Court's later cases on this question have been consistent with this view that a reasonable-observer test cannot turn private speech into government speech. *See Salazar v. Buono*, 559 U.S. 700, 720-21 (2010) (plurality op.) ("As a general matter, courts considering Establishment Clause challenges do not inquire into 'reasonable observer' perceptions with respect to objects *on private land*." (emphasis added)); *Good News Club*, 533 U.S. at 119 (declining to "employ Establishment Clause jurisprudence using a modified heckler's veto, in which a [private] group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive" about whether it is government speech).

Instead, the Court's cases have used a reasonable-observer test only *after* the Court concludes that the challenged speech qualifies as government speech. Even here, the appropriate test to apply *then* remains unclear. *See Salazar*, 559 U.S. at 720-21 (plu-

rality op.). Some cases suggest that a "reasonable observer" test applies to government speech, asking whether such an observer would view the government as endorsing religion. *See, e.g.*, *Cnty. of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring the in judgment). Others suggest that the relevant inquiry concerns whether the government has coerced religious participation or belief. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1824-27 (2014). In *Santa Fee*, for example, the Court applied both tests. After concluding that government speech was at issue, it found that a reasonable observer would view the student invocations as endorsement of prayer, *see* 530 U.S. at 305-09, and that the invocation program effectively coerced students who attended the football games to participate, *see id.* at 310-13. As these cases show, the reasonable-observer standard applies, at most, to determine only whether *admittedly* government speech survives constitutional scrutiny. It does not apply to determine whether the speech should qualify as government speech triggering the clause to begin with.

This jurisprudence, applied here, equally rebuts the Fifth Circuit's reasonable-observer test. If a reasonable observer cannot turn private speech into government speech for purposes of the Establishment Clause, the reasonable observer should not be able to turn government speech into private speech for purposes of the Free Speech Clause. Instead, the messages on state license plates qualify as government speech because they are "authorized by a government policy and take place on government property" and the States control "the content and topic of

the [license plate] message." *See Santa Fe*, 530 U.S. at 302-03.

CONCLUSION

The Court should reverse the Fifth Circuit's judgment below.

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APPENDIX

STATE	STATUTORY PROVISIONS
Alabama	Ala. Code §§ 32-6-64, -67 to -68 (setting forth general rules and procedures) Ala. Code §§ 32-6-70 to -114, -170 to -196, -250 to -680 (enabling specific plates)
Alaska	Alaska Stat. Ann. § 28.10.181 (setting forth general rules and enabling specific plates and categories of plates)
Arizona	Ariz. Rev. Stat. Ann. §§ 28-2401 to -2404 (setting forth general rules and procedures for special organization plates authorized before September 30, 2009) Ariz. Rev. Stat. Ann. §§ 28-2407, -2410, -2412 to -2415, -2417 to -2475 (enabling specific plates)
Arkansas	Special License Plate Act of 2005, Ark. Code Ann. §§ 27-24-101 to 111, -603 to -605 (setting forth general rules and procedures) Ark. Code Ann. §§ 27-24-201 to -214, -701 to -1422, -1601 to -1704 (enabling specific categories of plates)
California	Cal. Veh. Code § 5060 (setting forth general rules but held facially unconstitutional by a district court) Cal. Veh. Code § 5060.1 (prohibiting new plates under § 5060) Cal. Veh. Code §§ 5061-5067, 5068.1-5075 (enabling specific plates)

Colorado	Colo. Rev. Stat. §§ 42-3-207 to -208, -302, -312 (setting forth general rules and procedures) Colo. Rev. Stat. §§ 42-3-209 to -234, -237 to -247 (enabling specific plates)
Connecticut	Conn. Gen. Stat. §§ 14-19a to -19b (authorizing the adoption of regulations for the issuance of special organization and collegiate plates) Conn. Gen. Stat. §§ 14-20a to -21, -21d to -21w (enabling specific plates)
Delaware	Del. Code Ann. tit. 21, §§ 2137-2140a (enabling specific plates)
Florida	Fla. Stat. §§ 320.08053-.08056 (setting forth general rules and procedures) Fla. Stat. §§ 320.08058, .089-.0894 (enabling specific plates)
Georgia	Ga. Code §§ 40-2-60 to -60.1 (setting forth general rules and procedures) Ga. Code §§ 40-2-61 to -73, -84 to -85.3 (enabling specific plates) Ga. Code §§ 40-2-86 to -86.1 (enabling specific plates and appropriating generated revenues)
Hawaii	Haw. Rev. Stat. § 249-9.3 (setting forth general rules and procedures) Haw. Rev. Stat. § 249-9.2 (enabling military plates)
Idaho	Idaho Code §§ 49-402c to -402d (setting forth general rules and procedures) Idaho Code §§ 49-403 to -405, -414

	to -420m (enabling specific plates)
Illinois	625 Ill. Comp. Stat. § 5/3-600 (setting forth general requirements) 625 Ill. Comp. Stat. §§ 5/3-606 to -610.1, -620 to -699.13 (enabling specific plates)
Indiana	Ind. Code §§ 9-18-25-0.5 to -18-25-18 (setting forth general rules and procedures for the issuance of special group recognition plates) Ind. Code §§ 9-18-16-1 to -18-21-3, -18-23-1 to -18-24.5-5, -18-29-1 to -18-54-6 (enabling specific plates or categories of plates)
Iowa	Iowa Code § 321.34 (setting forth general rules and enabling specific plates)
Kansas	Kan. Stat. Ann. §§ 8-1,141 to -1,142 (setting forth general procedures and requirements) Kan. Stat. Ann. §§ 8-1,139 to -1,140, -1,145 to -1,146, -1,148 to -1,173 (enabling specific plates)
Kentucky	Ky. Rev. Stat. Ann. §§ 186.162-.164, (setting forth general procedures and requirements) Ky. Rev. Stat. Ann. §§ 186.166, .172, .1722 (enabling specific plates)
Louisiana	La. Rev. Stat. Ann. § 47:463 (setting forth general requirements) La. Rev. Stat. Ann. §§ 47:463.6, :463.9, :463.14, :463.22-.32, :463.36-.182, :490.1-.28 (enabling specific plates)
Maine	Me. Rev. Stat. tit. 29-A, §§ 468-469

	(setting forth general requirements and procedures) Me. Rev. Stat. tit. 29-A, §§ 454 to 456-G, 460 to 460-A, 515-B, 519, 523 to 524-B (enabling specific plates)
Maryland	Md. Code Ann., Transp. § 13-619 (setting forth general requirements and procedures) Md. Code Ann., Transp. §§ 13-618, -619.1 to -619.2 (enabling specific plates)
Massachusetts	Mass. Gen. Laws ch. 90, § 2f (setting forth general requirements and procedures, and listing various organizations eligible for consideration) Mass. Gen. Laws ch. 90, § 2e (enabling specific plates and appropriating their fees to corresponding funds)
Michigan	Mich. Comp. Laws §§ 257.811d-.811f, .811h (setting forth general requirements and procedures) Mich. Comp. Laws §§ 257.811i-.811y (enabling specific plates)
Minnesota	Minn. Stat. §§ 168.12, .1293 (setting forth general requirements and procedures) Minn. Stat. §§ 168.121-.1255, .129, .1295-.1299 (enabling specific plates)
Mississippi	Miss. Code Ann. §§ 27-19-44 to -45 (setting forth general requirements and procedures)

	Miss. Code Ann. §§ 27-19-46, -49 to -56.5, -56.7 to -56.8, -56.10, -56.12 to -56.389 (enabling specific plates)
Missouri	Mo. Rev. Stat §§ 301.2998-.2999, .3150-.3154 (setting forth general requirements and procedures) Mo. Rev. Stat. §§ 301.134, .145, .441, .443-.451, .453-.454, .456-.481, .3032, .3040-.3148, .3161-.3172 (enabling specific plates)
Montana	Montana Collegiate License Plates Act, Mont. Code Ann. §§ 61-3-461 to -468 (authorizing collegiate plates) Montana Generic Specialty License Plate Act, Mont. Code Ann. §§ 61-3-472 to -481 (setting forth general requirements and procedures for specialty plates) Mont. Code Ann. § 61-3-458 (authorizing special plates for certain military personnel, veterans, spouses, and families)
Nebraska	Neb. Rev. Stat. §§ 60-3,104.01 to -3,104.02 (setting forth general requirements and procedures) Neb. Rev. Stat. §§ 60-3,122 to -3,128 (enabling specific plates)
Nevada	Nev. Rev. Stat. §§ 482.367002-.36705, .38272-.38279 (setting forth general requirements and procedures) Nev. Rev. Stat. §§ 482.3672-.37945 (enabling specific plates)
New Hampshire	N.H. Rev. Stat. Ann. §§ 261:86 to :87-c, 261:91 to :91-a, 261:97-a to

	:97-f (enabling specific plates)
New Jersey	N.J. Stat. Ann. §§ 39:3-27.35 to -27.40 (setting forth general requirements and procedures) N.J. Stat. Ann. §§ 39:3-27.8, -27.13 to -27.18, -27.24 to -27.25, -27.29 to -27.34, -27.41 to -27.145, -33.10 (enabling specific plates)
New Mexico	N.M. Stat. Ann. § 66-3-424 (setting forth general requirements and procedures) N.M. Stat. Ann. §§ 6-3-405, -409, -411 to -422, -424.1 to -424.31 (enabling specific plates)
New York	N.Y. Veh. & Traf. Law §§ 404, 404-oo (setting forth general requirements and procedures) N.Y. Veh. & Traf. Law §§ 404-b to 404-w (enabling specific plates)
North Carolina	N.C. Gen. Stat. §§ 20-63(b1), 20-79.3a, 20-79.7 to -79.8 (setting forth general requirements and procedures) N.C. Gen. Stat. § 20-79.4 to -79.6, -81.12 (enabling specific plates and categories of plates)
North Dakota	N.D. Cent. Code § 39-04-10.13 (setting forth general requirements and procedures for organization plates) N.D. Cent. Code §§ 39-04-10.5, -10.8 to -10.12, -10.14 (enabling specific plates)
Ohio	Ohio Rev. Code §§ 4501.21, 4503.77-.79 (setting forth general requirements and procedures)

	Ohio Rev. Code §§ 4503.431-.433, .46-.481, .491-.591, .67-.762, .85-.96 (enabling specific plates)
Oklahoma	Okla. Stat. tit. 47, §§ 1135.1, .7-.8 (setting forth general requirements and procedures) Okla. Stat. tit. 47, §§ 1135.2-.3, .5-.6 (enabling specific plates and categories of plates)
Oregon	Or. Rev. Stat. §§ 805.202-.206 (setting forth general requirements and procedures, and enabling certain plates) Or. Rev. Stat. §§ 805.100-.117, .220-.230, .255-.274 (enabling specific plates)
Pennsylvania	75 Pa. Cons. Stat. Ann. §§ 1341-1341.1, 1370 (setting forth general authorizations and procedures) 75 Pa. Cons. Stat. Ann. §§ 1339, 1342, 1345-46, 1348-1369.2 (enabling specific plates)
Rhode Island	R.I. Gen. Laws § 31-3-94 (setting forth rules for expiration of statutory authorization for special plates) R.I. Gen. Laws §§ 31-3-15 to -17, -17.4, -46 to -48.1, -53, -72, -76, -78 to -80, -84 to -91, -93, -95 to -99, -102 to -103 (enabling specific plates)
South Carolina	S.C. Code Ann. §§ 56-3-8000 to -8110 (setting forth general requirements and procedures) S.C. Code Ann. §§ 56-3-1510 to -1660, -1750 to -1880, -2150 to

	-2180, -2540 to -2550, -2810 to -2840, -3310 to -5200, -5350 to -7950, -8200 to -11310, -11510 to -13610 (enabling specific plates)
South Dakota	S.D. Codified Laws §§ 32-5-175 to -178 (setting forth general requirements and procedures) S.D. Codified Laws §§ 32-5-113 to -125, -154 to -168 (enabling specific plates and categories of plates)
Tennessee	Tenn. Code Ann. §§ 55-4-201 to -210, -214 to -220 (setting forth general requirements, procedures, and provisions for allocation of revenues) Tenn. Code Ann. §§ 55-4-202, -212, -221, -225 to -231, -233 to -299 (enabling specific plates)
Texas	Tex. Transp. Code Ann. §§ 504.008, .601-.6012, .702-.802 (setting forth general requirements and procedures) Tex. Transp. Code Ann. §§ 504.301-.415, .511-.515, .602-.663 (enabling specific plates)
Utah	Utah Code Ann. §§ 41-1a-418 to -419 (setting forth general requirements and procedures) Utah Code Ann. §§ 41-1a-420 to -422 (addressing specific categories of plates)
Vermont	Vt. Stat. Ann. tit. 23, § 304 (setting forth general requirements and procedures) Vt. Stat. Ann. tit. 23, §§ 304, 304b-

	304c, 515a-515c (enabling specific plates)
Virginia	Va. Code Ann. § 46.2-725 (setting forth general requirements and procedures) Va. Code Ann. §§ 46.2-727 to -728.3, -735 to -749.130 (enabling specific plates)
Washington	Wash. Rev. Code §§ 46.18.005, .060 (imposing a temporary moratorium on new plates until July 1, 2015) Wash. Rev. Code §§ 46.18.100-.150 (setting forth general requirements, procedures) Wash. Rev. Code §§ 46.18.200-.215, .225-.270, .280-.295 (enabling specific plates)
West Virginia	W. Va. Code § 17a-3-14 (setting forth general requirements and procedures, and enabling specific plates)
Wisconsin	Wis. Stat. § 341.14 (setting forth general requirements and procedures, and enabling specific plates)
Wyoming	Wyo. Stat. Ann. §§ 31-2-215 to -220, -222, -229 (enabling specific plates)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *ET AL.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST [1] OF *AMICUS CURIAE*

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because this Court's decision on when the government may and may not regulate the content of citizens' viewpoints is crucial to preserving the protections afforded by the First Amendment to our Constitution. The unavoidable corollary to expanding the scope of "government speech" is limiting the scope of private speech and regulating individuals' viewpoints. The Rutherford Institute urges this Court to affirm the decision below.

SUMMARY OF ARGUMENT

The First Amendment protects a speaker's right to speak. In this case, the Court of Appeals was faced with the question of who the speaker was. It sought to answer that question by asking who a reasonable observer would believe the speaker to be. The Court of Appeals answered that question correctly, but using a reasonable observer standard is subjective and, thus, unreliable; this much is obvious from the straight-

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[1] This amicus brief is filed with the parties' consent. Petitioners filed their consent on December 12, 2014, and Respondents filed their consent on January 7, 2015. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

forward question: does the license plate in question honor soldiers or ancestors or antebellum prejudice?

This Court generally has avoided expressing its views on the content of speech in the context of its First Amendment analysis, instead allowing the marketplace of ideas to weigh the various views. Sitting in traffic, observing diverse license plates on the vehicles all around, is no different. Consistent with that principle, The Rutherford Institute asks the Court to consider instead whether the government has invited the private speech and, if it has, what groups or categories of speech the government invited to contribute to the marketplace of ideas. By borrowing this principle from the limited public forum context, this Court can establish clear guidance for distinguishing between government and private speech, and, in the process, explain to States how they can retain control of their messaging if that is what they wish to do. Reasonable observers may disagree whether a specialty license plate is private speech, but Texas's invitation to "any nonprofit entity" to sponsor specialty plates invites all nonprofit comers and requires viewpoint neutrality.

ARGUMENT

I. The Test Applied by the Court of Appeals for the Fifth Circuit—and Variations Applied by Other Courts of Appeals—Does Not Capture the Entire Government Speech Analysis.

In defining "government speech," the Court of Appeals for the Fifth Circuit drew upon two opinions from this Court, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Johanns v. Livestock Marketing*

Ass'n, 544 U.S. 550 (2005). *See Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 393 (5th Cir. 2014). The Court of Appeals for the Fifth Circuit is not alone in that regard. *See, e.g.*, *Newton v. Lepage*, 700 F.3d 595, 602 (1st Cir. 2012) (evaluating a mural in the reception area of a government agency); *Oberwetter v. Hilliard*, 639 F.3d 545, 554 (D.C. Cir. 2011) (asking whether a dancer must be permitted to perform in the Jefferson Memorial). This makes a certain amount of sense, because, as the Court of Appeals remarked, and as Justice Stevens observed in his concurrence in *Summum*, 555 U.S. at 481, the government speech doctrine is "recently minted."

The Court of Appeals here reached the correct result, but The Rutherford Institute writes to suggest that the test it applied in the process (1) improperly ignores a third line of United States Supreme Court cases that provides a much more precise and apt basis for ascertaining whether speech is public or private; and (2) is not in accord with this Court's precedent and is likely to lead to inconsistent results. In Section II, *infra*, The Rutherford Institute proposes an alternative test that it borrows from this Court's precedent on the "limited public forum," which accommodates the concerns raised by Petitioners and their *amici*. Under this alternative, the decision of the Court of Appeals below remains correct and should be affirmed.

A. The Two Cases Relied on by the Court of Appeals Represent Only Two of the Three Lines of Cases on Government Speech.

Summum is one of a line of cases that has assessed the intersection of Establishment Clause jurisprudence and speech with regard to the use of

government land. *Johanns*, in contrast, is from a line of cases that has evaluated (or recognized that the question was not ripe for addressing) the extent to which the government may require private persons to underwrite the cost of a government message. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring in judgment) ("Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context."); *Keller v. State Bar of Cal.*, 496 U.S. 1, 10 (1990) ("A governmental agency may use unrestricted revenue, whether derived from taxes, due[s], fees, tolls, tuition, donations, or other sources, for any purposes within its authority." (citation omitted)); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 482 & n.2 (1997) (Souter, J., dissenting) (acknowledging private persons have right to be free from subsidizing compelled speech by private and quasi-private organizations, and noting that the Secretary of Agriculture was not arguing that the speech at issue was government speech).[2]

But, beginning at least as early as *Board of Education v. Grumet*, 512 U.S. 687, 720 (1994),

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[2] *Wooley v. Maynard*, 430 U.S. 705 (1977), is along this line, although the specific question in that case was whether a speaker could refuse to communicate a government-adopted message, rather than to underwrite it.

another layer of cases arose—sometimes with Establishment Clause implications and sometimes not—in which the Court assessed the inverse of the question presented in the *Abood* line of cases: if the government is establishing an opportunity for private speech, what are the parameters of its control? Thus, in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), the Court found that the fact that the universities in question permitted and encouraged individual students to choose and participate in student activities required viewpoint neutrality. In *Southworth*, the Court drew an explicit line between facilitation of student expression and the speech of the university:

> Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different. When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

529 U.S. at 235. The Court also explained why having students vote for which expressive activities would receive student benefits was "constitutionally problematic": "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Id.*

The Court distinguished *Southworth* in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302-03 (2000), finding that the school district was the speaker for purposes of the Establishment Clause, because the school district allowed only a single student to give an invocation, "subject to particular regulations that confine the content and topic of the student's message." *Id.* The *Doe* Court agreed with the *Southworth* Court, however, that an election could not protect minority views. *Id.* at 304-05. Nonetheless, Chief Justice Rehnquist, in dissent, suggested that it would likely have been constitutional for the students to choose a speaker "according to wholly secular criteria—like good public speaking skills or social popularity—and the student speaker may have chosen, on her own accord, to deliver a religious message." *Id.* at 324 (Rehnquist, C.J., dissenting); *see also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (observing that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker" or "used private speakers to transmit information pertaining to its own program" and that the Legal Services Corporation program in question "was designed to facilitate private speech, not to promote a governmental message" (citation omitted)); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. ___, 133 S. Ct. 2321, 2328 (2013) ("In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.").

This Court has drawn from all three lines of cases in evaluating whether there is government speech at

issue. But, as discussed at greater length in Section I.B, *infra*, by failing to incorporate the principles set forth in the *Rosenberger* line of cases in the government speech analysis, the Court of Appeals here has—and other Courts of Appeals have—crafted a test that will not adequately guide the lower courts as they seek to differentiate government from private speech.[3]

To be sure, the Court of Appeals for the Fifth Circuit acknowledged *Rosenberger*, but only in the context of the second question the Court of Appeals faced—whether Texas's conduct was viewpoint discrimination. The Rutherford Institute writes to suggest that the *Rosenberger* line of cases also provides assistance to the question the Court of Appeals addressed first—whether the speech at issue is government speech or private speech.

B. The Reasonable Observer Test Is Inapt for Ascertaining Government Speech.

Although The Rutherford Institute writes in support of Respondents, it agrees with Petitioners that defining government speech by what a "reasonable observer" would perceive is "indeterminate" and can lead "different jurists to reach diametrically opposing

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[3] The Court of Appeals for the Fourth Circuit has developed its own test, where it asks whether speech was governmental based on: (1) "the central purpose of the program in which the speech in question occurs"; (2) "the degree of editorial control exercised by the government or private entities over the content of the speech"; (3) "the identity of the literal speaker"; and (4) "whether the government or the private entity bears the ultimate responsibility for the content of the speech." *See ACLU v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014), *petition for cert. filed sub. nom.*, *Bergen v. ACLU of N.C.*, No. 14-35 (July 11, 2014) (quotation marks and citation omitted).

conclusions." Pet'rs Br. at 29. For different reasons than those articulated by Petitioners, The Rutherford Institute also agrees that a subjective reasonable observer test is in tension with the principles underlying the government-private speech analysis. Considering the Court's precedents more broadly, however, it appears that this Court has actually used perception as a proxy for the structural assurances that a government is facilitating private speech. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 765-66 (1995) (plurality opinion) (crediting those familiar with community practices with the ability to recognize an open forum and private sponsorship of an activity).

In Texas, by statute, a sponsor (including "any nonprofit entity") of a specialty license plate can contract with a specified private vendor for the plate's manufacture and distribution, Tex. Transp. Code § 504.801(a), (b); may nominate a state agency to receive funds from the sale of the plates and "identify uses to which those funds should be appropriated," *id.* § 504.801(b); and individuals may personalize specialty license plates for an additional fee, *id.* § 504.102. Moreover, the Texas Transportation Code distinguishes between specialty license plates that serve specific functions—addressed in Subchapters C-F (for those with disabilities, in the military, or others with restricted distribution or regular license plates) and Subchapter G, which covers the specialty license plates for general distribution that are the provisions at issue here. Numerous aspects of individual choice have been built into Texas's specialty license plate scheme.[4] And, as a result, a person purchasing a

[4] Of course, just as with *Wooley*, the state could choose to speak by creating a uniform license plate that requires persons to "use

license plate knows that he or she can choose a plate based on personal preferences. Vehicle owners, as individuals, thus choose what to say as a community. *Cf. Capitol Square Review & Advisory Bd.*, 515 U.S. at 765-66 (plurality opinion) (noting community members are able to recognize private sponsorship of an activity in an open forum).

In contrast, in cases such as *Johanns*, 544 U.S. at 554, the government has deliberately set out to articulate a message that it has conceived; there is no question whose voice is being heard in that circumstance either. The public display cases take a step back from that, however, because, as this Court recognized in *Summum*, when the government owns property and deliberately places something on that land, it has "engaged in expressive conduct" without regard to what the message is or to whether it "formally embrace[s]" the message. 555 U.S. at 474. This creates a danger that counsels particular caution in ascribing speech to the government—and in giving the government the concomitant power to control that speech. When a government seeks to measure its conduct by a hypothetical reasonable observer, it will necessarily bring its own perspective to bear—something that Petitioners tacitly embrace by insisting that Texas should not be required to be

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their private property as a 'mobile billboard' for the State's ideological message" and "to be an instrument for fostering public adherence to an ideological point of view." 430 U.S. at 715. But that is not this case. *Cf. Cressman v. Thompson*, 719 F.3d 1139, 1157 (10th Cir. 2013) (reversing dismissal because plaintiff alleged sufficient facts to "suggest that the 'Sacred Rain Arrow' image on the standard Oklahoma license plate conveys a particularized message that others are likely to understand and to which he objects").

associated with what it perceives to be a pro-Confederacy stance.

But, as this Court explained, a monument "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* Indeed, text-based monuments "are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable." *Id.* at 475-76.

This case is illustrative of that ambiguity, because Petitioners have focused solely on the fact that some persons will be offended by references to the Confederacy; others may focus on the fact that a person is remembering a veteran, and those persons may recognize that every war engenders bitter responses by some and pride by others. For this reason alone, it is remarkable that Petitioners are self-righteous in their indignation toward Respondents when Texas has, in its own words, placed its "name and prestige behind" a plate honoring Buffalo Soldiers. Pet'rs Br. at 31. Apparently the State of Texas is willing to "associate with or endorse [and] propagate" a message that embraces a historical occurrence as demonstrating current prejudice—but only when the State is not offended.[5] *Id.* at 31-32.

This case has far less of a tie between the government and a message than the monuments at issue in *Summum*, because a license plate is typically

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[5] At the same hearing in which Respondents' proposed plate was rejected, the Texas Department of Motor Vehicles Board approved a plate honoring Buffalo Soldiers, despite a report that a group of Native Americans found the Buffalo Soldiers plate offensive. *See* Resp'ts Opp'n to Pet. for Writ of Cert. at 4.

viewed fleetingly (if a person looks beyond the make and model of a private automobile to the plate at all), while a monument may well be positioned by the government in an environment that invites a viewer to sit near it or to walk around or through it and to read any text on it and contemplate it. The only connection between the government and a personalized specialty plate is the fact that the State mandates *some* license plate for identification purposes.

When the government seeks to take upon itself to regulate what speech private persons engage in through government channels, the government takes on the role of the "voters" that were condemned in *Southworth*, controlling what message will be heard based upon how it construes the message. That offends the First Amendment, because the essence of the principle forbidding viewpoint discrimination is that minority views deserve precisely the same protection as majority views. *See Southworth*, 529 U.S. at 235.

Although not articulated in the same way, the Court of Appeals for the Second Circuit recognized the weakness of a subjective test in *Byrne v. Rutledge*, 623 F.3d 46, 60-61 (2d Cir. 2010):

> The infirmities in Vermont's application of its own statute are amply demonstrated by the case at bar. Byrne applied for the plate JN36TN, which the state refused to issue because Byrne's supplied meaning indicated his intent to refer to the Biblical passage John 3:16. However, as Byrne argues, and the record supports, Vermont would have approved that very same combination had Byrne supplied a secular meaning for it – e.g., "[M]y name is John, I am 36, [and] I was born

> in Tennessee." Of course, no one other than Byrne himself and the DMV clerk processing his application would know the difference – to all outside observers, the issued plate would appear the same irrespective of Byrne's supplied meaning – and yet the state would have us approve as "reasonable" its attempt to distinguish between the two applications for the same plate. This we decline to do. The state offers no legitimate government interest furthered in drawing such a distinction, nor can we discern any.

Id.

In any event, the reasonable observer analysis is often superfluous. In *Newton*, 700 F.3d at 602, for example, the government wanted to move a mural that "some" perceived as pro-labor, and the appellants argued that the proper test was "whether a person in the waiting room could have reasonably understood the mural's views to be those expressions of the artist and not of the government." The Court of Appeals refused to decide whether the speech was the artist's or the government's, finding greater significance in the prominence and location of the mural, and granting the government authority to "disassociate itself from an endorsement implicit from the setting for the mural." *Id.* Rather than apply a reasonable observer test, the case could have been decided merely based on the fact that "the government must have some discretion as to the choice of art it puts on the walls of its offices." *Id.* at 603.

Whether considered unnecessary, inapt, or unduly subjective, there exists a better alternative to the "reasonable observer" test applied here by the Court of Appeals for the Fifth Circuit.

II. The Demarcation Between Government Speech and Private Speech Should Be the Medium of Speech and the Government's Invitation to Speak.

This Court's jurisprudence provides an alternative means to clarify the standard for distinguishing between government speech and private speech, readily available in the First Amendment context. Decisions regarding the "limited public forum" offer an apt analogy for distinguishing between government and private speech and, on more than one occasion, this Court has looked to these principles as instructive for other purposes in First Amendment analysis. *See, e.g.*, *Velazquez*, 531 U.S. at 544; *Southworth*, 529 U.S. at 229-30. The Court should draw on those principles in this case to elucidate the distinction between government speech and private speech.

A limited public forum is a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (citing *Summum*, 555 U.S. at 470). A "forum" is not an entirely apt image, because a channel or medium of communication may constitute the relevant forum for this analysis, and the forum is defined with reference to the access sought by the speaker. *See Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). A more tailored analysis of the relevant forum may be appropriate to identify the forum to which speakers seek access on public property. *See id.* In *Cornelius*, the speakers sought access to the Combined Federal Campaign, a means by which entities could seek charitable contributions from federal employees. The speakers were not seeking

access to the federal government's physical property (i.e., the workplaces), but instead were seeking "access to a particular means of communication." *Id.*

In a limited public forum, the State may restrict speech, but it may not discriminate on the basis of viewpoint and the restriction must be reasonable in light of the purpose served by the forum. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).[6] Moreover, once "limited" access is granted to the "forum," the constitutional right of access extends to other entities of similar character. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983). The objective of this standard is not to narrowly define the category or group that has been permitted; once the forum is opened to a category or group, the government may not prohibit a particular viewpoint of similar groups or within that category. *See, e.g., Rosenberger*, 515 U.S. at 824-25 (holding unconstitutional a restriction on reimbursement of costs to student news organization because its publications expressed a religious viewpoint); *Lamb's Chapel*,

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[6] There is some suggestion that Texas did not create a limited public forum in this case because it did not *intend* to do so, citing *Cornelius*, 473 U.S. 788. *See* Amicus Br. of Ohio et al. at 20-24. *Cornelius* certainly discusses an intent requirement, but based on subsequent decisions, including *Rosenberger*, *Summum*, and *Christian Legal Society*, among others, it appears the "intent" requirement of *Cornelius* applies to a "designated public forum," rather than a "limited public forum," as those terms are used in more recent decisions of this Court. The scope of permissible regulation for the "nonpublic forum" in *Cornelius* and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and for the "limited public forum" in more recent decisions of this Court confirm the interchanged labels. *See also Byrne*, 623 F.3d at 54 n.8. Accordingly, Respondents need not show that Texas intended to create a limited public forum in specialty license plates.

508 U.S. at 387, 394 (concluding that state law permitting "social, civic, or recreational uses" of public schools could not prohibit religious viewpoints on those topics).

For this reason, the Court of Appeals for the Seventh Circuit, in *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 855 (7th Cir. 2008), may have taken too granular a view of the permissible exclusion. Illinois permitted anyone to sponsor a specialty license plate if they obtained a sufficient number of applicants. The broad scope of the invitation prohibited Illinois from discriminating against the viewpoints of the invited individuals. But in considering the message rather than the scope of the invitation, that is precisely what the flawed analysis of the Court of Appeals for the Seventh Circuit permitted. The Court of Appeals for the Second Circuit, by comparison, properly recognized that the scope of the invitation controls. *See Byrne*, 623 F.3d at 55.[7] By inviting all to adopt a vanity plate, Vermont could not reject a particular viewpoint—i.e., religious.[8]

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[7] Under Petitioners' application of the reasoning of the Court of Appeals for the Seventh Circuit, no court could find—as the Court of Appeals for the Second Circuit did—that the government was doing anything except controlling access to the forum when it excludes plates. Indeed, Petitioners' brief cites *Choose Life Illinois* in arguing that it should be entitled to reject Respondents' proposed specialty plate because "[t]he State has not issued any specialty license plate that disparages the confederate battle flag or the views espoused by the Sons of Confederate Veterans." Pet'rs Br. at 46.

[8] This is not to say that Vermont could not exercise any control over the content of the vanity license plates. Its statute expressly delineated certain characteristics of plates that were categorically excluded. But those circumstances are objective, narrowly defined, and carefully maintained. None would apply

The discord in the analysis among the Courts of Appeals is troubling. The Courts of Appeals for the Fourth, Sixth, and Seventh Circuits reached different results and for different reasons on nearly identical specialty license plates. Although the Fourth and Seventh Circuits agreed that the speech was private, they disagreed on the permissible regulation; the Sixth Circuit, however, did not even agree that private speech rights were implicated. *Compare Tata*, 742 F.3d at 574 (concluding North Carolina legislative enactment could not choose one side of abortion debate because specialty license plates implicate private speech rights), *with White*, 547 F.3d at 865-66 (concluding that Illinois legislature could exclude entire subject of abortion because the exclusion was content-based but viewpoint neutral, as permitted in a nonpublic, or limited public, forum), *and ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 379-80 (6th Cir. 2006) (concluding Tennessee could legislatively limit specialty license plates to one side of debate because the "Choose Life" message was government speech). These inconsistent results—as to whether and even when there is agreement on who is the speaker—underscore that the approaches currently used in the Courts of Appeals are inadequate to provide clear guidance to distinguish between government speech and private speech.

Applying the limited public forum principles by analogy, the State's invitation for private participation in an area of traditional government speech provides a clear means to distinguish between government and private speech. An invitation extended to certain categories or groups requires the government to

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here. And, certainly, the potential to offend is not one of those circumstances.

permit all private viewpoints even in an area traditionally considered government speech, subject to reasonable restrictions.

Here, Respondents seek access to a medium of communication, which Texas has opened to certain groups. In particular, Texas has invited *any* non-profit entity to submit a proposal for a specialty license plate. Tex. Transp. Code § 504.801(b).[9] Texas goes on to say that it will "design each new specialty license plate in consultation with the sponsor" and that it "may refuse to create a new specialty license plate if the design might be offensive to any member of the public, if the nominated state agency does not consent to receipt of the funds derived from issuance of the license plate, if the uses identified for those funds might violate a statute or constitutional provision, or for any other reason established by rule." *Id.* § 504.801(c).

Petitioners insist that the latter provision transforms Texas into the speaker and enables it to control whether individual sponsors may use specialty license plates to convey messages. But section 504.801(c) is not the State *speaking*; it is the State reserving to itself the discretion to determine whether "any member" of the public "might be" offended, and then the additional discretion whether to refuse to produce the plate—or not—even if it thinks any member (or many members) may be offended. That allowed the State to approve the Buffalo Soldiers plate and disapprove Respondents' plate.

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[9] Texas has also invited for-profit entities and individuals to design specialty license plates through a third-party vendor. *See* Tex. Transp. Code § 504.6011(a). The Rutherford Institute focuses on nonprofit entities because Respondents fall within that group.

It is thus the power of discrimination that Texas calls "government speech." But, as the Court of Appeals for the Ninth Circuit succinctly stated: "The government speech doctrine is a jurisprudential theory by which the federal government can regulate its own communication 'without the constraint of viewpoint neutrality.'" *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877 (9th Cir. 2014), *petition for cert. filed*, No. 14-857 (Jan. 16, 2015) (citation omitted). If, as in *Johanns*, the government has a message that it intends to communicate, its freedom to define the parameters of that content makes sense. And if, as in *Summum*, the issue is not what the government intends to say but that it is being permanently said on a finite amount of government property, it likewise makes sense that the government be permitted to choose the content of that speech.

But here, Texas invoked the standard, "might be offensive to any member," as the basis for refusing Respondents' proposed plate. That basis permitted Texas to do precisely what is prohibited in a limited public forum—Texas discriminated against a viewpoint of a nonprofit entity it had invited to create a specialty license plate. The statute's subjective standard engenders this discrimination because it is, by its terms, *not* viewpoint neutral. Rather, it allows the State to reject a proposal *because of* its viewpoint and the potential to offend. *Cf. Capitol Square Review & Advisory Bd.*, 515 U.S. at 765-66 (plurality opinion) (recognizing that it is not realistic to worry that others may perceive that government endorsement "followed directly from the fact that the forum was open and the religious activity privately sponsored," noting that erroneous conclusions do not count). Said another way, Texas has reserved for itself the right to prohibit a perspective. That is stifling private speech, not

exercising the prerogative of a government speaker. *See Rosenberger*, 515 U.S. at 831 ("By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.").

By opening specialty license plates to private speech through proposals, Texas has invited private speech into a medium that Texas had previously reserved to itself. Texas may not call the resultant speech its own so that it may engage in viewpoint discrimination against Respondents. Such a holding in no way undermines the government's regulatory interest in using license plates as a means for identifying vehicles and confirming proper registration. The government retains that interest even on a private speech plate.

Indeed, under the limited public forum analysis, States also retain the right to select messages of their own and endorse viewpoints—so long as the States exercise the right exclusive of private speech. *Compare* Pet'rs Br. at 41-46 (elaborating on risk of "untenable consequences"); *see generally* Amicus Br. of Ohio et al. (raising concerns regarding implications of decision below for State specialty license plate programs); Amicus Br. of Phil Berger and Tim Moore (arguing legislatively-controlled specialty license plates are government speech). This analysis also

avoids the concern raised in *Summum* of closing the forum to speech altogether. States will be able to include the same messages they have before, so long as it is the State actually engaging in the speech, whether through the legislative or executive branch. *Cf. Rosenberger*, 515 U.S. at 834 ("A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles").

Once the States invite private parties to apply to include their messages on State-issued license plates on private vehicles, though, the States have yielded the platform to other, quintessentially private messages. The channel of communication then becomes analogous to a limited public forum and the State must permit all viewpoints within the permitted category.[10] Said another way, Texas permits private vehicle owners to purchase a "Fight Terrorism" specialty license plate; vehicle owners can then choose to espouse that view. By permitting a "Fight Terrorism" plate, Texas cannot decide that that viewpoint on that issue is the only viewpoint Texas will offer for sale to the public. Texas has invited any

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[10] Considering the medium of the messaging also distinguishes Texas's reliance on *Texas ex rel. Texas Transportation Commission v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995). In that case, Texas excluded the KKK from the State's Adopt-a-Highway program because it did not want to be associated with the KKK's beliefs. The Adopt-a-Highway program, however, is associated with State highways and signage for the State program along the highway. Texas had not ceded control over the signage as it has to nonprofit entities for specialty license plates. The same is true for the monument in the public park at issue in *Summum*. The medium of the speech was a *public* park over which the city retained control.

nonprofit entity to share the platform, and it cannot discriminate among the views of nonprofit entities. Nonetheless, Texas is always free to return to the "plain-vanilla license plate," or to reserve to itself the right to create specialty plates, which would be government speech subject only to *Wooley*. It could also invite universities, or could invite only those who wish to sponsor plates bearing Texas monuments.

Under this alternative framework, the result reached by the Court of Appeals for the Fifth Circuit in this case is correct. By allowing "any nonprofit entity" to propose specialty license plates, Texas ceded a level of discretion to those entities over the content of that portion of the license plate. As a result, the government surrendered the right to treat the license plate, as a whole, as a channel for speech subject to censorship. Texas's effort to retain some control of that messaging violated Respondents'—and others'—First Amendment right to free speech.

CONCLUSION

By statute, Texas encouraged any nonprofit group to express itself through specialty license plates, but it gave itself the privilege of controlling the messages conveyed, and it called the result "government speech." The Court of Appeals properly recognized that it was not government speech at all, but the test that the Court of Appeals employed is not reliably consistent. Existing Court precedent, however, provides an apt analogy for this case in the context of limited public fora. By applying this framework, the difference between government and public speech becomes evident from the State's invitation to the public to speak. Once Texas invited any nonprofit to sponsor specialty license plates, Texas forfeited the right to exclude messaging from similar entities.

Texas can no longer pick and choose the messages that may be conveyed on specialty license plates.

The decision of the Court of Appeals for the Fifth Circuit should be affirmed, not because a "reasonable observer" would conclude specialty license plates constitute private speech, but because the medium is not exclusively public and Texas has permitted private parties to speak through that medium. By employing principles of limited public fora, the Court can provide guidance for distinguishing between government speech and private speech that will provide the clarity needed in this and various other contexts that the parties and other *amici* have raised throughout the briefing in this case. A clearer standard will benefit all.

Respectfully submitted,

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